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In The Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-678

SHELL OIL COMPANY,
Petitioner

V.

ANNE M. DARTT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDICES

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In The
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NO. _____

SHELL OIL COMPANY,
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V.

ANNE M. DARTT,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDICES

Shell Oil Company, Petitioner, respectfully petitions for a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-styled case on August 19, 1976, in which the Court reversed a district court decision dismissing the instant action for failure of the Respondent to timely file a Notice of Intent to Sue in accordance with

Section 626(d)(1) of the Age Discrimination In Employment Act (29 U.S.C. §626(d)(1)).

OPINIONS BELOW

The decision and order of the United States District Court for the Northern District of Oklahoma are reported at ___ F. Supp.___, 10 FEP Cases 844 (N.D. Okla. 1975) (Appendix A, infra, pp. 1a-15a). The opinion of the United States Court of Appeals for the Tenth Circuit is reported at ___ F.2d ___, 13 FEP Cases 12 (10th Cir. 1976) (Appendix B, infra, pp. 16a-26a). The Order denying the Petition for Rehearing is not reported. (Appendix C, infra, p. 27a)

JURISDICTION

The opinion of the Court of Appeals was filed on July 22, 1976. A timely Petition for Rehearing was filed with the Court on August 3, 1976, and that Petition was subsequently denied on August 19, 1976.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1) Whether timely compliance with the notice-of-intent-to-sue requirement of 29 U.S.C. §626(d) is a substantive jurisdictional prerequisite to suit;

2) Whether the *de facto* purposes of the notice requirement were fulfilled by Respondent's oral complaint to the Department of Labor which failed to state any intent to maintain a private lawsuit;

3) Whether any equitable tolling of the notice requirement is permissible where:
   a) Petitioner was not responsible for Respondent's failure to meet the time limitations;
   b) Petitioner complied with all statutory requirements designed to notify employees of their rights under the Age Discrimination in Employment Act.

4) Whether an indefinite tolling of the time to satisfy the notice requirement is warranted where:
   a) Respondent had acquired the means of knowledge of the notice requirement;
   b) Respondent was pursuing a permissive administrative remedy.

5) Whether the Court of Appeals incorrectly substituted its judgment for that of the district court in deciding that an equitable tolling was warranted in this case.

STATUTES INVOLVED

This case involves the interpretation and application of Section 626 of the Age Discrimination In Employment Act (29 U.S.C. §626). The text of that statute is set forth in Appendix D, infra, pp. 29a.

STATEMENT OF THE CASE

The Respondent, Mrs. Dartt, was employed by the Petitioner, Shell Oil Company, on January 3, 1966, at which time she was forty-four years old. Mrs. Dartt was terminated on July 31, 1973 and was fifty-one years old at the time of her t rmination.

Mrs. Dartt believed that her termination was due to her age, and she immediately contacted an attorney who was a member of a club to which she belonged. This attorney referred her to another attorney, who advised Mrs. Dartt that "You don't need an attorney. You need to go to the Federal Wage and Hour Department."

Mrs. Dartt then decided to go to the U.S. Department of Labor, Wage and Hour Division, to register her complaint. Her stated reason for so doing was:

> I thought that the Department of Labor would take care of everything and I frankly thought an attorney would be an added expense and if the Department of Labor would handle it, why bother with an attorney.

Mrs. Dartt met with J. Dean Speer, Assistant Area Director of the local Wage and Hour office on or about August 9, 1973, at which time she made an oral complaint. Mr. Speer contacted Shell officials shortly thereafter, and advised them that Mrs. Dartt had made a complaint, but had not filed a Notice of Intent to Sue.

Mr. Speer asked the Shell officials if they were interested in pursuing a possible settlement of the case, or if they preferred to undergo an investigation. Shell expressed

no interest in settlement, and, in November of 1973, Mr. Speer requested a large volume of statistical data from Shell.

While Shell was in the process of compiling this data, Mr. Speer had several different conversations with Mrs. Dartt regarding the status of her case, and advised her that it might take up to a year to complete his investigation. Mrs. Dartt never inquired as to whether she could dispense with efforts of the Department of Labor and bring her own suit, nor did Mr. Speer advise her that she could file her own lawsuit.

On March 5, 1974, Mr. Speer sent a letter to Mrs. Dartt, which letter contained a pamphlet which set forth the fact that private lawsuits could be maintained if a notice of intent to sue was filed within 180 days after the alleged violation occurred. Mrs. Dartt testified that this letter gave her knowledge for the first time of the notice requirement.

Mrs. Dartt immediately contacted her present attorney, who advised her that she had probably missed the time limits, but that a notice should nonetheless be filed. This attorney filed a notice of intent to sue on behalf of Mrs. Dartt on or about March 14, 1974. This notice was filed 216 days after the termination of Mrs. Dartt.

Mr. Speer received the notice and processed it, because he had been given instructions not to take any

position on timeliness. He contacted Shell officials and actively pursued the possibilities of settlement. These conciliation efforts proved unsuccessful, and Mr. Speer so notified Mrs. Dartt.

Mrs. Dartt subsequently filed suit against Shell, pursuant to the A.D.E.A. provisions making it unlawful to discriminate against employees aged 40 to 65 because of their age. Shell filed a Motion to Dismiss, on the grounds that the Complaint revealed on its face that Mrs. Dartt had failed to timely file a notice of intent to sue.

After two evidentiary hearings, the District Court held that the filing of a timely notice of intent to sue was a mandatory jurisdictional requirement. The District Court found that the initial oral complaint did not fulfill the requirements of Section 626(d), because the oral complaint never notified Shell during the 180-day period that Mrs. Dartt intended to sue. The District Court further found that the oral complaint would not toll the notice period, because the registering of an oral complaint was a permissive act which was not a prerequisite to filing a private lawsuit. The District Court finally held that no equitable tolling was warranted under the facts of this case, because Shell had not prevented Mrs. Dartt from timely compliance with the notice requirement.

In discussing the relative equities of this case, the District Court found that Mrs. Dartt could not rely upon the omission of the Department of Labor in failing to tell

her of the notice requirement, because the Department of Labor had no statutory obligation to volunteer this information. The District Court concluded that, in the final analysis, Mrs. Dartt was responsible for her own failure to meet the time limits, because she had not inquired into her rights or what was necessary to preserve them. The District Court found that Mrs. Dartt had constructive notice of the notice requirement through the posting of the A.D.E.A. posters by Shell, and ruled that it was "just" to require Mrs. Dartt to rely upon such remedies as the Department of Labor might seek on her behalf, where she had not actively sought to pursue any private remedy.

The Court of Appeals reversed, holding that the oral complaint by Mrs. Dartt fulfilled the *de facto* purposes of the Section 626(d) requirement, and resulted in an indefinite tolling of that requirement to the time when she actually filed her formal notice of intent to sue. Such a tolling was required, according to the Court of Appeals, because Mrs. Dartt had promptly followed private legal advice on two occasions and had sought to present her claim to the Department of Labor.

The Court of Appeals rejected the findings of the District Court that Mrs. Dartt had presumptive knowledge of the law and constructive knowledge of the statute by means of the A.D.E.A. posters posted by Shell. The Court of Appeals held that it could not "in good conscience" hold Mrs. Dartt to timely compliance with the Section

626(d) notice requirement based upon the language of these posters.

The Court of Appeals viewed as immaterial the fact that Shell had never been informed, at any time within the 180-day period, that Mrs. Dartt was intending to file suit. The Court of Appeals further viewed as immaterial the fact that Shell was not responsible for the contents of the A.D.E.A. posters. Finally, the Court of Appeals viewed as immaterial the fact that Shell was not legally responsible for the failure of either Mrs. Dartt's first attorney or the Department of Labor to advise her of the notice requirement.

Although the Court of Appeals recognized that early notice of an impending lawsuit gives an employer added impetus to engage in conciliation, the Court of Appeals found that the oral complaint by Mrs. Dartt adequately put Shell on notice of the instant action. The Court of Appeals thereby rejected the findings of the District Court that the oral complaint did not, in fact, effectively notify Shell that Mrs. Dartt was going to bring a civil action against it. The Court of Appeals likewise rejected the finding of the District Court that the relative equities were evenly balanced between Shell's failure to receive a timely notice and the failure of Mrs. Dartt to file a timely notice, warranting the leaving of Mrs. Dartt to Labor Department actions on her behalf. The Court of Appeals

therefore reversed and remanded the case for trial.

REASONS FOR GRANTING THE WRIT

A. THE DECISION BELOW PRESENTS A DIRECT CONFLICT WITH THE DECISIONS OF THIS AND OTHER COURTS AND WITH THE LEGISLATIVE HISTORY OF THE A.D.E.A.

1. The Court of Appeals ruled that timely compliance with the Section 626(d) notice requirement is not a substantive jurisdictional requirement, but that the time period contained therein is analogous to a statute of limitations. As such, the Court of Appeals ruled that the time period is subject to equitable modifications under certain circumstances. This Court has never addressed the issue of the manner in which the time limits set forth in Section 626(d) should be treated.

The question presented is an important one, which should be decided by this Court. There is a clearcut split of authority in the Circuit Courts as to the manner in which the Section 626(d) requirement should be construed.

All of the Circuits, except the Tenth Circuit, appear to be of the view that timely compliance with the time limitation set forth in Section 626(d)(1) is a substantive jurisdictional precondition to suit, which is governed by those decisions of this Court holding that such limitation periods "must be strictly adhered to by the judiciary."[1]

[1] *Kavanaugh v. Noble*, 332 U.S. 535, at 539 (1947).

The Tenth Circuit, on the other hand, appears to view the instant case as controlled by that line of cases allowing equitable modifications of statutes of limitations.[2]

Both the Fifth and Sixth Circuits have rejected the argument that the Section 626(d) requirement is analogous to the F.E.L.A. statute of limitations problem presented in *Glus, infra.* In *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975), the Sixth Circuit pointed out that A.D.E.A. lawsuits are governed by a separate statute of limitations set forth in 29 U.S.C. §255. While this separate statute of limitations was governed by the *Glus* tolling principle, the Sixth Circuit held that the Section 626(d) was not. The Fifth Circuit reached the identical conclusion in *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974), holding that timely compliance with the Section 626(d) notice requirement "is simply a prerequisite to the right to file any suit whatsoever under the ADEA" (494 F.2d at 487).

These Circuits, as well as other courts, have found support in both the statutory language and the legislative history of the A.D.E.A. for the conclusion that timely compliance with the notice requirement is mandatory. The section of the Act in question specifically provides that the notice "shall be" filed within 180 days of the alleged unlawful practice. The House, in enacting Section 626,

[2]See, e.g., *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959); *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965).

referred to the mandatory nature of complete compliance with the Section by describing such as a "condition precedent" to suit.[3] The Senate Report stated that "in the case of suits brought by individuals, notice of intent to sue *must* be given the Secretary of Labor within 180 days after the alleged unlawful practice occurred . . ."[4]

Based upon this clear statutory language and legislative history, virtually every court which has addressed the issue has ruled that timely compliance with the notice requirement is an integral part of the right to maintain a private suit, absent which the court is divested of jurisdiction. In *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1975), the Eighth Circuit stated that timely compliance with Section 626(d) is a jurisdictional requirement, and indicated that it would treat untimely compliance with the Section in the same manner as it did in the Title VII case of *Hinton v. CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975). In the *Hinton* case, the plaintiff failed to file suit within 90 days after receipt of his Right-To-Sue letter from the E.E.O.C., in reliance upon the agreement of the defendant not to raise the issue of timeliness while the parties engaged in pre-suit settlement negotiations. Suit was later filed, and the district court

[3]H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967); 1967 U.S. Code Cong. and Admin. News pp. 2213, 2218. See also, 1967 U.S. Code Cong. and Admin. News p. 2223.

[4]S. Rep. No. 723, 90th Cong., 1st Sess. (1967), 113 Cong. Rec. 31251. (Emphasis supplied.)

dismissed the action *sua sponte* for lack of jurisdiction. The Eighth Circuit affirmed, holding that timely compliance was a jurisdictional prerequisite to suit, not subject to equitable modifications.

Similarly, in *Edwards v. Ka'ser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975), the Fifth Circuit rejected a claim by the plaintiff that the defendant had wrongfully concealed the existence of the plaintiff's A.D.E.A. rights by failing to post the statutory notices required by the Department of Labor, thereby committing constructive fraud. There, the argument by the plaintiff was similar to that presented in *Glus, supra*. The Fifth Circuit reaffirmed its conclusion, stated first in *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974), that timely compliance with the Section 626(d) notice requirement "is simply a prerequisite to the right to file any suit whatsoever under the ADEA." 515 F.2d 1195, at 1199.

The Sixth Circuit has reached the same conclusion in three separate cases. In *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1975), the plaintiff argued that the employer had wrongfully concealed his cause of action, and that the time for filing the Section 626(d) notice was thereby tolled. The Court expressed grave doubts that any such tolling would be permissible, as the statute created an "imperative requirement" which was expressed in "unequivocal statutory language." (521 F.2d 632, at 634)

Similarly, in *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1976), the Sixth Circuit held that the "imperative nature" of the Section 626(d) notice requirement precluded any equitable tolling of the requirement. There, the plaintiff had believed that there was an adequate state remedy available, and he attempted to pursue it. His notice of intent to sue was filed 299 days after his discharge. The District Court dismissed the action for lack of jurisdiction, finding that the state law was insufficient to allow the plaintiff to invoke the 300-day notice period allowable under 29 U.S.C. §626(d)(2), and that the plaintiff should have filed within 180 days. The Sixth Circuit affirmed, even though there were clear equities in the plaintiff's favor. Finally, in *Ott v. Midland-Ross Corp., supra*, the Sixth Circuit allowed a tolling of the Section 255 statute of limitations due to alleged fraud by the defendant, but refused to apply such tolling principles to the Section 626(d)(1) requirement of the timely filing of a notice of intent to sue.

The above cases reveal that the Tenth Circuit is alone among the Circuits in its conclusion that the Section 626(d) notice requirement is subject to equitable modifications. This Court should follow the rationale of *Kavanaugh v. Noble, supra*, and the great weight of Circuit Court and District Court authority,[5] and hold that the time periods

[5] *Powell v. Southwestern Bell Tel. Co.*, 494 F.2d 485 (5th Cir. 1974); *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 *(Continued)*

set forth in Section 626(d) must be "strictly adhered to by the judiciary . . . . Remedies for resulting inequities are to be provided by Congress, not the courts."[6]

2. The Court of Appeals found that the oral complaint by Mrs. Dartt to the Departmen' of Labor fulfilled the "*de facto*" purposes of the Section 626(d) notice, and resulted in an indefinite tolling of the time period to file a formal written notice of intent to sue. The propriety of

(Footnote 5 Continued)

(5th Cir. 1975); *Law v. United Air Lines, Inc.*, 519 F.2d 170 (10th Cir. 1975); *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1976); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975); *Eklund v. Lubrizol Corp.*, 529 F.2d 247 (6th Cir. 1975); *Woodburn v. LTV Aerospace, Inc.*, 531 F.2d 750, 12 FEP Cases 1667 (5th Cir. 1976); *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92 (8th Cir. 1976); *Oshiro v. Pan American World Airways, Inc.*, 387 F. Supp. 80 (D.C. Haw. 1974); *Vaughn v. Chrysler Corp.*, 382 F. Supp. 143 (E.D. Mich. 1974); *Blankenship v. Ralston Purina Co.*, 62 F.R.D. 35 (N.D. Ga. 1973); *Burgett v. Cudahy Co.*, 361 F. Supp. 617 (D.C. Kan. 1973); *Gebhard v. GAF Corp.*, 59 F.R.D. 504 (D.C. D.C. 1973); *Price v. Maryland Casualty Co.*, 62 F.R.D. 614 (D.C. S.D. 1974); *Cochran v Ortho Pharmaceutical Co.*, 376 F. Supp. 302 (E.D. La. 1971); *Acford v. Exxon Corp.*, ___ F. Supp. ___, 12 FEP Cases 1500 (D.C. Conn. 1975); *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976); *Brohl v. Singer Co.*, 407 F. Supp. 936, 12 FEP Cases 541 (M.D. Fla. 1976); *McGinley v. Burroughs Corp.*, 407 F. Supp. 903, 12 FEP Cases 112 (E.D. Pa. 1975); *Raynor v. Great Atlantic & Pacific Tea Co.*, 400 F. Supp. 357 (E.D. Va. 1975); *Mizugachi v. Molokai Electric Co.*, 411 F. Supp. 590, 12 FEP Cases 1085 (D.C. Haw. 1976); *Berry v. Crocker National Bank*, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976); *Hayes v. Southern Pacific Co.*, ___ F. Supp. ___, 13 FEP Cases 753 (C.D. Cal. 1976); *Goodman v. Heublein, Inc.*, ___ F. Supp. ___, 13 FEP Cases 26 (D.C. Conn. 1976).

[6]*Kavanaugh v. Noble*, 332 U.S. 535, at 539 (1947).

allowing such an indefinite tolling, even beyond the time when Mrs. Dartt acquired the means of knowledge of her A.D.E.A. rights, will be separately addressed below. We deal here with the question of whether Congress intended that oral complaints would be sufficient to fulfill the Section 626(d) requirements.

The question presented is an important one, which has not been decided by this Court. There is a clear conflict among the Circuits, and in the district courts, as to whether oral complaints to the Department of Labor adequately advise employers that they are faced with impending litigation. In the instant case, counsel for Mrs. Dartt stipulated to the District Court that at no time during the 180 day period did Mrs. Dartt tell the Department of Labor that she was intending to sue Shell. Rather, she simply made an oral complaint that charged Shell with age discrimination against her.

The statute expressly requires that a "notice of intent to sue" shall be "filed" within 180 days. This statutory language is clear and unambiguous, and should be enforced according to its plain and obvious meaning. Nothing was done by Mrs. Dartt within the 180 day period which evidenced an intent to sue Shell. Thus, even assuming that an oral notice might suffice, none was given here.

Moreover, the statute states that such notice must be "filed." The word "file" has traditionally been considered to mean that the claim must be made in writing, not

orally. See, e.g., *Ritter v. U.S.*, 28 F.2d 265, at 267[3] (3rd Cir. 1928); *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976).

This clear statutory language requires that a prospective plaintiff make a written statement to the Department of Labor setting forth an intention of suing. That a mere oral complaint does not fulfill the *de facto* purposes of Section 626(d) is apparent from the legislative history and the statutory scheme enacted by Congress for enforcement of the A.D.E.A.

The 180 day notice requirement was in the original Senate bill, and was deleted from the House bill. The provision was restored by the Senate when it considered the House-passed bill, and the House concurred in its restoration.[7] In discussing the reasons for the Section 626(d)(1) requirement, Senator Javits stated that such was "intended to answer some of the disquiet in American businesses . . . keeping also in mind the practical problems of administration . . . ."[8]

In the enactment of the A.D.E.A., Congress expressed its intention that the majority of age discrimination complaints would be administratively processed by the Department of Labor. A very limited right to bring a private

[7]See the excellent analysis of the legislative history in *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485, at 487-488 (5th Cir. 1974).

[8]113 Cong. Rec. 35056

action was preserved for only those plaintiffs who moved quickly to bring their own lawsuit. Persons who did not act quickly to bring their own lawsuits were left to the administrative actions of the Department of Labor, which is under no similar requirement to act within 180 days.

There were legitimate reasons for Congress to have so circumscribed a private right of action. It is a recognized fact in business circles that litigation, even if frivolous, is very expensive. An employer against whom an individual suit is brought under the A.D.E.A. runs the risk of incurring not only the expenses of backpay and its own litigation expenses, but also the litigation expenses of the plaintiff.[9] When faced with these prospects while the total amount of backpay is still relatively small, the employer has a significant impetus to settle the case.[10]

However, as the backpay amounts grow larger through the passage of time, the employer may be in a position to ill-afford the added cost in the settlement of the payment of an attorney fee to counsel for the plaintiff, with a resultant negative impact on successful settlement. Moreover, employers obviously considered it preferable to have the Department of Labor administratively "weed out" un-

[9]29 U.S.C. §626(b), 29 U.S.C. §216(b).

[10]See the analogous Title VII case of *EEOC v. Hickey-Mitchell Co.*, 507 F.2d 944, 8 EPD ¶9834 (8th Cir. 1974) wherein the Eighth Circuit found that even the most recalcitrant employer is more likely to settle when told that it will be sued. The Eighth Circuit found substantial prejudice to the employer by the failure of EEOC to timely notify it that suit was to be filed.

founded complaints in the administrative process, as they lobbied extensively for the short limitation period on private lawsuits.

Congress was certainly aware of these factors when it established the 180 day period for the filing of notices of intent to sue. Shell was prejudiced, both presumptively and in fact, by the lack of any timely notice to it that Mrs. Dartt intended to bring suit. Shell was entitled to the early opportunity to make an informed business decision, including consideration of added litigation expenses, as to whether conciliation of the Dartt complaint was advisable.

Shell was further entitled, after 180 days elapsed, to rely upon the fact that no private suit could be brought against it. Therefore, Shell had no need to take into account any litigation expenses incurred by Mrs. Dartt in setting aside reserves against possible litigation losses. Likewise, in making its own budgetary plans, Shell could reasonably budget a smaller amount for its own counsel fees, due to the lesser need for attorney time during the administrative process.

The majority of the courts have found that employers are not adequately notified by a mere oral complaint that they will be sued, and that to treat such an oral complaint as fulfilling the *de facto* purposes of Section 626(d)(1) would negate the clear Congressional intent. In *Powell v. Southwestern Bell Telephone Co.*, 494 F.2d 485 (5th Cir. 1974), the plaintiff registered an oral complaint with the

Department of Labor within the 180 day period, but did not file a notice of intent to sue until after the 180 days had expired. The plaintiff argued that her oral complaint, together with the informal action on her behalf by the Department of Labor, was sufficient to satisfy or, at least, toll the notice period. The Fifth Circuit dismissed her suit, holding that the oral complaint simply did not equate to a statement of a "personal intent to commence a private lawsuit." (494 F.2d 485, at 489)

Similarly, in *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1976), the Sixth Circuit held that an oral complaint to the Department of Labor "does not constitute notice of intent to sue as mandated by the statute." (521 F.2d at 634) Significantly, the Sixth Circuit cited with approval the decision by the District Court in the instant case in support of the above holding.

Several district courts have also found that the registering of an oral complaint with the Department of Labor does not give the employer notice that it will be sued, and therefore does not comply with the statute. In *Berry v. Crocker National Bank*, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976), the plaintiffs made oral complaints to the Department of Labor, but did not file timely notices of intent to sue. They argued that their oral complaints were sufficient to put their employer on notice of their claims, but the Court disagreed and dismissed, relying on *Hiscott, supra*. In a similar case, *Goodman v. Heublein,*

Inc., ___ F. Supp. ___, 13 FEP Cases 26 (D.C. Conn. 1976), the District Court granted a partial motion to dismiss as to claims occurring prior to 300 days before a written notice of intent to sue was filed. The plaintiff had argued that his earlier oral complaints to the Department of Labor constituted notice of intent to sue, but the District Court rejected that claim, relying on *Powell* and *Hiscott, supra*.

Finally, in *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976), the District Court refused to consider an oral notice of intent to sue as fulfilling the Section 626(d) requirements. There, the plaintiff gave an actual statement of his intention to sue (rather than only making a complaint) within 180 days. His formal written notice was filed on the 181st day. The District Court refused to consider the oral notice as meeting the statutory requirements, and dismissed.

All of these cases present a clearcut conflict with the instant case as to whether an oral complaint fulfills the *de facto* purposes of the Section 626(d) notice. Of equal significance is the interpretation given by the Department of Labor as to what actions satisfy the Section 626(d) notice requirement. In an opinion letter issued by the Department of Labor regarding the manner in which the Section 626(d) requirement is satisfied, the Department stated:

> No particular form is needed to notify the Secretary of Labor of an intent to file suit under the Age Discrimination in Employment Act. However, such notice should be provided in writing . . . .[11]

This is an administrative interpretation of the Act which is entitled to "great deference."[12] It lends support to the conclusion that a written notice setting forth an intent to sue is required by the Department of Labor before it sets in motion its conciliation functions and its analysis of the case as one for intervention or preemptive suit.

Indeed, the actions by the Department of Labor in the instant case belie any conclusion that the administrative processing of Mrs. Dartt's oral complaint satisfied the *de facto* purposes of Section 626(d). The pre-notice "conciliation" was little more than an inquiry as to whether Shell wanted to settle, which seems far short of the concerted conciliation efforts which the statute requires of the Department of Labor. Moreover, prior to receipt of the written notice filed by Mrs. Dartt, the Department not only did not inform Shell that Dartt was intending to sue, but affirmatively told Shell that she had not filed a notice of intent to sue. Finally, when the Department did receive the written notice filed by Mrs. Dartt, it did not rely upon its prior contacts with Shell as fulfilling either the notice or conciliation functions prescribed by Section 626(d). Instead, it gave Shell written notice of Mrs. Dartt's action, and began to vigorously pursue possible settlement.

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[11] *Burgett v. Cudahy Co.*, 361 F. Supp. 617, at 621 (D.C. Kan. 1973).

[12] See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, at 435 (1971).

The Court of Appeals erred, both in law and in fact, in holding that the oral complaint by Mrs. Dartt fulfilled the *de facto* requirements of Section 626(d). As a result, this Court must reverse.

3. The third issue presented is whether, assuming *arguendo* that equitable tolling of the Section 626(d) notice period may be appropriate in some instances, such a tolling is appropriate where the employer did nothing to prevent the complainant from fulfilling the statutory requirements. It has been traditionally held that, while tolling of a "statute of limitations" is permissible where a defendant has misled a plaintiff,[13] the actions of a third party not in privity with a defendant do not warrant any tolling.[14]

The record reveals no evidence that Shell was in any way responsible for the failure of Mrs. Dartt to timely file her notice of intent to use.[15] Rather, all of the evidence

[13]See, e.g., *Glus v. Brooklyn Eastern District Terminal, supra; Bailey v. Glover,* 21 Wall. 342, at 348, 22 L. Ed. 636.

[14]See, e.g., *Cato v. South Atlantic & Gulf Coast Dist. of Intl. Longshmn. Assn.*, 364 F. Supp. 489, at 493 (S.D. Tex. 1973), affd. per curiam 485 F.2d 583 (5th Cir. 1973). See also, *Edwards v. Kaiser Aluminum & Chemical Sales, Inc.*, 515 F.2d 1195 (5th Cir. 1975), wherein the Fifth Circuit expressly declined to charge the employer with the derelictions of third parties — the plaintiff's attorneys.

[15]Although the Decision of the Court of Appeals seems to suggest that Shell was indirectly responsible for Mrs. Dartt's predicament by deliberately stalling in furnishing the data requested by the Department of Labor, a reading of the testimony of Mr. Speer yields no such conclusion. Moreover, when this argument was raised for the first time on appeal, Shell submitted an Affidavit by its Manager of Em-

(Continued)

reflects that the failure of Mrs. Dartt to timely file her Notice of Intent to Sue was due to her failure to inquire as to the conditions under which she could maintain a private lawsuit. Indeed, the record establishes that, had Mrs. Dartt so inquired, the Department of Labor would have informed her of the time limits, as its failure to do so was a simple oversight.

This Court is, therefore, presented with the important question of whether an equitable tolling is permissible where the plaintiff missed the time limits through simple ignorance of the law. The cases relied upon by the Court of Appeals lend no assistance in this inquiry, as all of those cases dealt with situations where the defendant was found to have wrongfully caused the plaintiff to miss the time limits.

In the case of *McGinley v. Burroughs Corp.*, 407 F. Supp. 903 (E.D. Pa. 1975), relied upon by the Court of Appeals, the plaintiff claimed that the defendant had willfully and fraudulently concealed the hiring of others to fill his former position, and that he timely filed as soon as he became aware of the true facts. The District Court, on traditional equitable grounds, tolled the Section 626(d) requirement during the period of the alleged fraud. In an

(Footnote 15 Continued)
ployee Relations, which reveals that the delays were due solely to the volume of data requested. (Appendix E, p. 38a) This Affidavit was never objected to, or rebutted, by either Mrs. Dartt or the Department of Labor.

analogous case under Title VII, *Reeb v. Equal Opportunity Atlanta*, 516 F.2d 924 (5th Cir. 1974), the Fifth Circuit tolled the time for filing an EEOC charge where the plaintiff alleged that the defendant had wrongfully concealed the reasons for her discharge.[16]

Similarly, in *Bishop v. Jelleff Associates, Inc.*, 398 F. Supp. 579 (D.C. D.C. 1974), the District Court completely excused the failure of the plaintiffs to meet the Section 626(d) requirement where their employer failed to post the required age discrimination posters. The Court held that the plaintiffs should not be penalized where their employer failed to advise them of their rights under the A.D.E.A. Likewise, in *Skoglund v. Singer Co.*, 403 F. Supp. 797 (D.C. N.H. 1975), the District Court preliminarily found that it might toll the Section 626(d) requirement if the defendant employed had failed to post the required age posters and had thereby prevented the plaintiff from acquiring knowledge of his rights. In a later decision, not cited by the Court of Appeals,[17] the District Court found insufficient equities warranting a tolling, and dismissed the plaintiff's action.

This is not a case where the defendant acted in any

[16] The Fifth Circuit has subsequently severely limited the *Reeb* decision to the facts of the case. See *East v. Romine, Inc.*, 518 F.2d 332 (5th Cir. 1975); *Freeman v. Motor Convoy, Inc.*, 409 F. Supp. 1100, 11 EPD ¶10,650 (5th Cir. 1975).

[17] *Skoglund v. Singer Co.*, 403 F. Supp. 797 (D.C. N.H. December 12, 1975), 13 FEP Cases 253.

way to mislead the plaintiff. Likewise, it is not a case where a government agency misinformed the plaintiff as to the requirements of the statute.[18] Instead, it is a case of simple ignorance of the time limitations, which should be governed by the oft-repeated maxim that "mere ignorance of his rights on the part of the plaintiff . . . will not toll the statute of limitations."[19]

The decision of the Court of Appeals in the instant case is in direct conflict with the decision of the Fifth Circuit in *Edwards v. Kaiser Aluminun & Chemical Sales, Inc.*, holding that no equitable tolling is permissible where the ignorance by the plaintiff was not caused by the defendant. It is likewise in conflict with a number of district court decisions which refused to allow any tolling where the ignorance of the plaintiff of the requirement was not attributable to the defendant.[20]

This Court has never addressed the issue presented herein, and should resolve the conflict presented by the decision of the Court of Appeals.

B. THE CASE RAISES VITAL QUESTIONS

[18] See, e.g., *Arnold v. Hawaiian Telephone Co.*, ___ F. Supp. ___ (D.C. Haw. 1975), 12 FEP Cases 400.

[19] *Scroggin Farms Corp. v. McFaddin*, 165 F.2d 10, at 15 (8th Cir. 1948).

[20] *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976); *Berry v. Crocker National Bank*, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976); *Goodman v. Heublein, Inc.*, ___ F. Supp. ___, 13 FEP Cases 26 (D.C. Conn. 1976).

CONCERNING THE INTERPRETATION OF THE A.D.E.A. WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

1. The Court of Appeals refused to charge Mrs. Dartt with either presumptive or constructive notice of the provisions of the A.D.E.A., because of the inadequacy of the A.D.E.A. posters posted by Shell throughout its facility. The Court then tolled the time limits set forth in Section 626(d)(1), due to the lack of actual knowledge by Mrs. Dartt of the requirement.

The questions raised by such a holding are vital to the administration of not only the A.D.E.A., but of many other statutes. Shell has set forth in the Appendices to this Petition copies of the posters issued by E.E.O.C. under Title VII,[21] the Department of Labor under the F.L.S.A.,[22] and the old and new A.D.E.A. posters.[23] None of these posters set forth the time limitations for the filing of charges or the bringing of suit.

Utter chaos will result if the time limitations under these statutes are considered tolled because of the supposed inadequacies of these posters. More importantly, it would be patently unfair to employers to charge them with responsibility for the contents of posters which they did not draft and which they believed in good faith to be adequate.

[21] Appendix F.

[22] Appendix G.

[23] Appendices H and I.

Indeed, charging Shell with the responsibility for the inadequacy of these posters seems clearly contrary to the statute, which insulated employers from liability where they relied on official agency action.[24] Here, the posters were officially issued by the Department of Labor, and posted by Shell in accordance with 29 U.S.C. §627. Shell is entitled to be relieved of responsibility if such posters are found to be inadequate.

In addition, the refusal of the Circuit Court to charge Mrs. Dartt with presumptive or constructive knowledge of the A.D.E.A. is in conflict with literally hundreds of decisions by this and other courts. It would be impossible for Shell to cite all of the cases in which plaintiffs have had their lawsuits dismissed, based only upon presumptive knowledge.[25] In the vast majority of these cases, there was no notice posted — in the courthouse or elsewhere — which advised these plaintiffs of even the existence of their statutory rights.

Under the A.D.E.A., both the Fifth and Sixth Circuits have held that A.D.E.A. plaintiffs are charged with presumptive knowledge of the Section 626(d) requirement, even though their employers did not post the age posters required by the Department of Labor.[26] Here, Shell was

[24] See 29 U.S.C. §626(e), incorporating 29 U.S.C. §259.

[25] See, e.g., *Kavanaugh v. Noble, supra.*

[26] *Edwards v. Kaiser Aluminum & Chemical Sales, Inc., supra;* and *Hiscott v. General Electric Co., supra.*

found to have posted the required posters, and should be accorded the benefit of the presumption. The Court of Appeals committed clear error in holding that Mrs. Dartt did not have presumptive and constructive knowledge of the A.D.E.A., and its decision must be reversed.[27]

To do otherwise would require time limitations to run from actual notice of the limitation and require case-by-case determinations of when that actual knowledge was acquired. Such an approach has been consistently eschewed by the Congress and this Court, except in very limited instances, such as fraud.[28] Even in those cases, the limitation period usually runs from the time the person reasonably should have known of the fraud. Assuming *arguendo* that such a rule should apply here, Mrs. Dartt acquired the means of knowledge of her private right of action when she contacted an attorney and then went to the Labor Department. Had she conducted a reasonable inquiry into her rights to bring a private lawsuit at that time, she would have learned of them. Shell should not be charged with her failure to make such an inquiry.[29]

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[27] The Court of Appeals failed to discuss how, if at all, a more detailed poster would have benefited Mrs. Dartt. In the District Court, Mrs. Dartt claimed that the A.D.E.A. posters had not been posted. However, the District Court found that her testimony was "unbelievable," and that the posters were conspicuously posted throughout the facility where she worked.

[28] See, e.g., *Glus v. Brooklyn Eastern District Terminal, supra.*

[29] See *Edwards v. Kaiser Aluminum & Chemical Sales, Inc., supra; Berry v. Crocker National Bank, supra.*

2 The District Court found that, under the A.D.E.A., there are two separate and distinct enforcement mechanisms. Under the first enforcement mechanism, a complainant may go to the Department of Labor at any time within two years and register a complaint of age discrimination. The complainant places full reliance on the Department of Labor to protect his or her rights, and is bound by any settlement reached by the Department.

Under the second enforcement mechanism, the complainant invokes an entirely different procedure. All that this person must do to be able to bring a private action is to file a notice of intent to sue within 180 days after the alleged violation, and then afford the Department a period of sixty days in which to mediate the dispute. This complainant need not ever invoke the first enforcement mechanism and, unlike one who invokes the first mechanism, is free to reject any Department settlement of his case.

The District Court found that a complainant who wishes to bring a private A.D.E.A. action is not required to invoke the first enforcement mechanism, and one who does so is seeking a permissive administrative remedy. The District Court followed the long line of cases holding that pursuit of a permissive remedy does not toll a limitation period,[30] and refused to toll the Section 626(d) notice

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[30] *Steel Improvement & Forge Co. v. U.S.*, 355 F.2d 627 (Ct. Cl. 1966); *O'Callahan v. U.S.*, 451 F.2d 1390 (Ct. Cl. 1971). See also, *Johnson v. Railway Express Agency, Inc.*, ___ U.S. ___, 95 S. Ct. 1716 (1975).

period based upon Mrs. Dartt's oral complaint to the Department of Labor.

The Court of Appeals reversed, and held that the registering of the oral complaint by Mrs. Dartt, and the subsequent administrative actions taken by the Department on her behalf, indefinitely tolled the Section 626(d) time period up to the time when Mrs. Dartt filed her written notice of intent to sue. The questions presented by the allowance of this indefinite tolling are clearly important ones, which vitally affect the administration and enforcement of the A.D.E.A.

Those courts which have allowed a tolling of the Section 626(d) notice period, due to alleged misdeeds by the defendant employers, have usually tolled the time periods only until the plaintiffs became aware of the alleged fraud or of their A.D.E.A. rights.[31] Only one court has allowed an indefinite tolling similar to that permitted here.[32]

Two Circuit Courts have discussed possible tolling of the Section 626(d) notice period, but have rejected any concept of indefinite tolling. In *Edwards v. Kaiser Alum-*

[31] *McGinley v. Burroughs Corp.*, 407 F. Supp. 903 (E.D. Pa. 1975); *Skoglund v. Singer Corp.*, 403 F. Supp. 797 (D.C. N.H. 1975). Cf. *Reeb v. Equal Opportunity Atlanta*, 516 F.2d 924 (5th Cir. 1974); *Glus v. Brooklyn Eastern District Terminal, supra; Bailey v. Glover*, 21 Wall. 342, at 348, 22 L. Ed. 636.

[32] *Bishop v. Jelleff Associates, Inc.*, 398 F. Supp. 579 (D.C. D.C. 1974).

inum & Chemical Sales, Inc., 515 F.2d 1195 (5th Cir. 1975), the Fifth Circuit rejected an argument by the plaintiff that his employer's misdeeds indefinitely tolled the time for filing his notice of intent to sue. The Circuit noted that the plaintiff had failed to file within 180 days after consulting an attorney (which gave him the means of knowledge of his A.D.E.A. rights) or within 180 days after he acquired actual knowledge of his A.D.E.A. rights. The Circuit reserved a ruling on whether tolling might ever be appropriate, but held that it would not, in any event, allow an indefinite tolling.

In *Hiscott v. General Electric Co.*, 521 F.2d 632 (6th Cir. 1976), the Sixth Circuit rejected an argument by the plaintiff that an employer's misdeeds indefinitely tolled or excused the Section 626(d) requirement. The Court further noted that, even if a tolling of the requirement was permissible, the 180 day period would begin to run again at some point. (521 F.2d at 634)

In addition, in a somewhat analogous Title VII case relied upon heavily by the Court of Appeals below,[33] the Fifth Circuit held that a tolling of the Title VII charging requirement would be permitted only until the time when "the facts which would support a cause of action are apparent or should be apparent . . . ." (516 F.2d 924, at 931)

Thus, the decision of the Court of Appeals allowing an indefinite tolling of the Section 626(d) requirement

[33] *Reeb v. Equal Opportunity Atlanta, supra.*

past the time when Mrs. Dartt acquired the means of knowledge of her A.D.E.A. rights is plainly wrong. Even if the time period was tolled due to the inadequacy of the posters, it began to run again when Mrs. Dartt contacted a private attorney and the Department of Labor on or before August 9, 1973 and acquired the means of knowledge of the requirement. As a result, the time limitation period would have run at least 27 days before the notice was filed. The Court of Appeals was further plainly wrong in its allowance of any tolling whatsoever because of Mrs. Dartt's use of a permissive administrative remedy.

An analogous situation to the one herein was recently before this Court in the case of *Johnson v. Railway Express Agency, Inc., supra*. The plaintiff in *Johnson* had two separate and distinct remedies, one under Title VII and one under 42 U.S.C. §1981. The plaintiff chose to use the administrative remedies under Title VII and, when he later brought suit, his §1981 claim was held time-barred.

The plaintiff argued that the limitation period under §1981 should be tolled while he pursued his alternate remedy under Title VII, but this Court rejected that argument. This Court held that, where a plaintiff has an unfettered right to invoke a certain remedy, but does not, he has slept on his rights, stating:

> The fact that his slumber may have been induced by faith in his Title VII remedy is of little relevance, inasmuch as the two remedies are truly independent. (95 S. Ct. at 1723)

This Court must reverse the decision of the Court of Appeals allowing a tolling of the Section 626(d) requirement while a complainant invokes the alternative complaint procedures available under the A.D.E.A. To do otherwise would create wholesale inconsistencies in the treatment of similarly-situated plaintiffs and defendants.

There is no doubt that plaintiffs who never went to the Department of Labor were just as ignorant of the Section 626(d) requirement as was Mrs. Dartt.[34] Their ignorance of the requirement is unchanged, whether they go to the Department of Labor to complain before[35] or after[36] the 180 days period has run. Moreover, these plaintiffs are just as ignorant of the requirement if their attorneys fail to tell them,[37] as when the Department of Labor omits to tell them. However, the employer may still have notice of the claim well within the 180 day period, even though the subsequent notice is untimely filed.[38]

If the rationale of the decision by the Court of Ap-

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[34]See, e.g., *Acford v. Exxon Corp.*, ___ F. Supp. ___, 12 FEP Cases 1500 (D.C. Conn. 1975).

[35]See, e.g., *Hughes v. Beaunit Corp.*, ___ F. Supp. ___, 12 FEP Cases 1564 (E.D. Tenn. 1976); *Goodman v. Heublein, Inc.*, ___ F. Supp. ___, 13 FEP Cases 26 (D.C. Conn. 1976).

[36]See, e.g., *Hiscott v. General Electric Co., supra.*

[37]See, e.g., *Edwards v. Kaiser Aluminum & Chemical Sales, Inc., supra; Berry v. Crocker National Bank*, ___ F. Supp. ___, 13 FEP Cases 673 (N.D. Cal. 1976).

[38]See, e.g., *Edwards v. Kaiser Aluminum & Chemical Sales, Inc., supra; Powell v. Southwestern Bell Telephone Co., supra.*

peals is allowed to stand, similarly-situated employees and employers will be subject to wholly different time limits, based upon whether the employee registered an oral complaint with the Department of Labor. The District Court correctly concluded that Congress did not intend that such an exception be carved out for oral complaints. Its decision should be affirmed.

3. The Court of Appeals held that it would not be equitable to dismiss the private suit by Mrs. Dartt. In the view of the Court of Appeals, Mrs. Dartt had acted reasonably in pursuing her complaint and was excusably ignorant of the Section 626(d) requirement. Because of her actions, and the finding of no prejudice to Shell, the Court of Appeals concluded that it would be equitable to allow her suit to continue.

The District Court had a different view of the relative equities in the instant case. The District Court believed that Mrs. Dartt had not acted reasonably in failing to inquire as to what needed to be done if she wanted to dispense with the assistance of the Department of Labor and bring her own suit. The District Court further believed that the interests of defendants and of the Department of Labor are necessarily prejudiced under the statute where no timely Section 626(d) notice is given. Weighing all of these factors, the District Court concluded that it would be "fair" to leave Mrs. Dartt's claim with the Department of Labor.

Assuming that equitable considerations come into play in the instant case, it is well-settled that the exercise of these equitable powers are committed to the sound discretion of the district courts.[39] The review powers granted to the circuit courts of appeal are "correspondingly narrow"[40] and are limited to the question of "whether there has been an abuse of discretion."[41]

Here, the District Court carefully weighed all of the circumstances, including the fact that Mrs. Dartt would still have available the use of the services of the Department of Labor in the investigation and possible litigation of her case. In the exercise of its equitable discretion, the District Court concluded that it would not be inequitable to leave Mrs. Dartt to the remedy which she selected.

The decision of the Court of Appeals makes no finding that the District Court abused its discretion. Rather, its decision appears to make a *de novo* determination that the Court of Appeals panel might have exercised their discretion in a different manner, had they sat as trial judges in the case.

This is an impermissible exercise of the power of appellate review, and must be overturned.[42]

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[39] *Burns v. U.S.*, 287 U.S. 216 (1932); *Swann v. Charlotte-Mechlenberg Board of Education*, 402 U.S. 1 (1971); *Lemon v. Kurtsman*, 411 U.S. 192 (1973).

[40] *Lemon, supra*, 411 U.S. at 200.

[41] *Burns, supra*, 287 U.S. at 223.

[42] See, e.g., *Larson v. U.S.*, 296 F.2d 167, at 170 (8th Cir. 1961).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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EXHIBIT A

[Filed Feb. 6 — 1975 Jack C. Silver, Clerk,
U.S. DISTRICT COURT]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

CASE NO. 4-C-221

ANNE M. DARTT,
Plaintiff,

-vs-

SHELL OIL COMPANY,
Defendant.

ORDER

This case involves the construction and application of Section 7(d) of the Age Discrimination in Employment Act (ADEA), 29 U.S.A. §626(d). Plaintiff is a former employee of Defendant. She alleges that she was discharged by Defendant solely because of her age. Section 4(a) of the ADEA, 29 U.S.C. §623(a), makes it unlawful for an employer who is covered by the Act to discharge any individual because of the individual's age. The ADEA has application to individuals who are at least forty years of age but less than sixty-five years of age, 29 U.S.C. §631. Plaintiff states she was fifty-one years of age when discharged.

Defendant has filed herein a Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b) (6), Federal Rules of Civil Procedure. It is Defendant's position that this Court lacks subject matter jurisdiction to hear this case. Although lack of subject matter jurisdiction is normally attacked through a Motion to Dismiss for lack of subject matter jurisdiction

made pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, Defendant's Motion is proper herein as Defendant attacks a defect which appears on the face of Plaintiff's Complaint. It is Defendant's position that the Complaint shows Plaintiff failed to file timely notice of an intent to sue with the Secretary of Labor as required by 29 U.S.C. §626(d). This defect, apparent on the face of the Complaint, is an affirmative defense. Affirmative defenses which appear on the face of a Complaint may be asserted by a Motion to Dismiss for failure to state a claim upon which relief can be granted. 5 Federal Practice and Procedure, Civil, Wright and Miller, §1357.

Defendant has raised a substantial jurisdictional question through its Motion to Dismiss. The Court has, pursuant to the direction of *Schramm* v. *Oakes*, 352 F. 2d 143 (Tenth Cir. 1965), held evidentiary hearings to more fully develop the facts necessary to determine the jurisdictional challenge. The pertinent facts of this case as derived from the well pleaded allegations of the Complaint and two evidentiary hearings are found to be as follows:

Plaintiff was employed by Defendant from January 3, 1966 until July 31, 1973. She was terminated at the latter date. At the date of termination Plaintiff was fifty-one years of age. During the period of Plaintiff's employment, since and after 1967, Defendant maintained posted notices informing employees of the ADEA in conspicuous places throughout the places where Defendant was employed.[1] Though Defendant testified she did not see these notices, a reasonably alert employee in the same or similar circumstances as Plaintiff would have seen them. On September 9, 1974, shortly after her termination, Plaintiff contacted Mr. J. D. Speer, an Assistant Area Director of the Department of Labor in the Tulsa, Oklahoma area. At this time

[1]These notices are required by 29 U.S.C. §627.

she complained that she had been fired because of her age. Mr. Speer did not inform Plaintiff that she had a right to maintain a civil action on her own behalf under the ADEA. He stated that he would investigate the complaint. Subsequently, Plaintiff attempted to contact Mr. Speer several times by telephone. In each instance she was informed she would be notified as soon as any action was taken on her complaint. On March 5, 1974 Speer wrote Plaintiff a letter in which he stated there would be a delay in investigating her complaint. In this letter he also informed Plaintiff she had the right to bring a civil action on the basis of her complaint. He enclosed a Department of Labor Pamphlet containing basic information concerning the ADEA. This was the first date on which Plaintiff claims she had actual knowledge of her right to maintain civil action under the ADEA. Thereafter Plaintiff contacted an attorney who, on March 14, 1974, mailed a letter to the Department of Labor addressed to the local office at Tulsa, Oklahoma, for the attention of Mr. Speer, informing the Department that the Plaintiff intended to commence a civil action against the Defendant based on alleged ADEA violations.

29 U.S.C. §626(d) reads in part as follows:

> "No civil action may be commenced by an individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —
>
> (1) within one hundred and eighty days after the alleged unlawful practice occurred, . . ."

It is Defendant's position that the face of the Complaint reveals Plaintiff did not file notice of intent to file a civil action within one hundred and eighty days of the alleged discriminatory act and that when notice was filed it was not with the Secretary as is required by the Section, but was with a local Assistant Area Director. It is Plaintiff's position that the 180 day filing period is directory and not

jurisdictional. She further contends she gave adequate notice by informing the Department of the alleged discriminatory act on her initial visit with Mr. Speer. She further contends the filing period should be tolled in this case because the Department failed to inform her of her right to bring a civil action under the ADEA. (To this same end she contends Defendant failed to perform its statutory duty of posting notice informing employees of the ADEA as is required by 29 U.S.C. §627 but the Court resolves this factual issue against Plaintiff as heretofore set out.)

With regard to Plaintiff's contention that the filing of a notice of an intent to sue with the Secretary within 180 days of an alleged discriminatory act is not a jurisdictional prerequisite to the right to maintain a civil action under the ADEA, the Court concludes Plaintiff's position is neither supported by authority nor reason.[2] Literally every reported

[2]Plaintiff relies on *Goger* v. *H. K. Porter Company, Inc.*, 492 F. 2d 13 (Third Cir. 1974) to support her contention that filing notice of intent within the statutory period is not a jurisdictional prerequisite to the right to maintain a civil action. *Goger* deals with 29 U.S.C. §626(d)(2). This section sets the time limits within which notice of intent to sue must be filed in cases falling under Section 14(b) of the ADEA, 29 U.S.C. §633(b). Section 14(b) basically provides that if a state has an agency with authority to deal with age discrimination in employment the state remedy must be attempted before a civil action under 29 U.S.C. §626(d) may be commenced. In *Goger* the plaintiff failed to avail himself of available state remedy. Instead he proceeded directly through the Department of Labor. The time limits within which the plaintiff could have commenced an action under the state law expired. The district court dismissed the action holding that the ADEA required the plaintiff to exhaust available state remedies prior to commencing a civil action. On appeal the Third Circuit held:

> "While we do not consider the failure to file a timely complaint with the appropriate state agency a mere 'technical' omission, we nonetheless consider equitable relief to be appropriate in view of the total absence, to our knowledge, of any judicial decision construing section 633(b) during the period involved here and in view

(Continued)

case which has dealt with the question has held the filing period to be jurisdictional. *Powell* v. *Southwestern Bell Telephone Company*, 494 F. 2d 485 (Fifth Cir. 1974; *Oshiro* v. *Pan American World Airways, Inc.*, 378 F. Supp. 80 (D. Hawaii 1974); *Cochran* v. *Ortho Pharmaceutical Company*, 376 F. Supp. 302 (E.D. La. 1971); *Burgett* v. *Cudahy Company*, 361 F. Supp. 617 (D. Kan. 1973); *Bunch* v. *Barnett*, 62 FRD 615 (D. S.Dak. 1974); *Gebhard* v. *GAF Corporation*, 59 FRD 504 (D.C. D.C. 1973). Also, the intent of Congress is clearly expressed in the statute. Notice of an intent to sue *shall* be filed within one hundred and eighty days of an alleged discriminatory act. Where the language of a statute is plain and unambiguous it must be given effect according to its plain and obvious meaning. 82 CJS Statutes §322(2). Thus it is the decision of this Court that filing notice of an intent to sue with the Secretary within 180 days of an act of age discrimination is a jurisdictional prerequisite to the right to maintain a civil action under 29 U.S.C. §626(d)(1).

(Footnote 2 continued)

> of the remedial purposes of the 1967 Act. In the future, however, we think the Congressional intent that state agencies be given the initial opportunity to act should be strictly followed and enforced . . ."

Plaintiff's reading of the case is incorrect. In *Goger* the court granted equitable relief under the circumstances of the case since there were no cases construing the point raised by that plaintiff on appeal. The court did hold that resort to available state remedies was a jurisdictional prerequisite to the maintenance of a civil action based on the ADEA. And the court clearly stated that in the future, now that there was a decision on point, the Congressional intent should be strictly enforced and followed. This case does not by analogy support Plaintiff's position. Indeed, it undermines her position. There are many cases holding that, in situations to which §626(d)(1) applies, filing notice of an intent to sue within 180 days of the alleged discriminatory act is a jurisdictional prerequisite to the maintenance of a civil action. Thus, Plaintiff cannot avail herself of the special circumstances of *Goger*. In fact *Goger* must, in this case, be read to support the proposition that the clear intent of Congress should be applied and enforced.

Plaintiff's second contention is that her act of informing the Department of Labor that she had been fired because of her age constitutes sufficient notice of an intention to sue to either satisfy 29 U.S.C. §626(d)'s notice requirement or to toll the running of the 180 day notice period. This argument is supported by some authority but not by reason. Plaintiff relies on *Woodford* v. *Kinney Shoe Corporation*, 369 F. Supp. 911 (N.D. Ga. 1973). The facts of *Woodford* are very similar to the facts herein. In *Woodford* the plaintiff contacted the Department one hundred and sixty days after she was fired and stated that she had been discriminated against. Apparently she did not state she intended to sue, however, the facts on this point are not specific. The court held:

> ". . . where an employee, within one hundred and eighty days of his discharge, reports to the Labor Department that he has been discharged from his job because his employer discriminates against older workers, the employee's right to file suit later under the Age Discrimination Act is preserved, even if the employee does not in so many words declare to the Department his intent to file such an action."

This decision disregards the clear mandate of 29 U.S.C. §626(d) that:

> "No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty day's *notice of an intent to file such action* . . ." (Emphasis added.)

It is difficult to equate a complaint of age discrimination made to a local wage and hour office with a notice of intent to bring a civil action filed with the Secretary of Labor. The language of Section 626 could not be clearer as to what is required. To hold that a complaint of age discrimination is a notice of intent to sue is in effect to rewrite a portion of a Federal statute. This is beyond the power of the Court.

The ADEA is enforced according to the powers, remedies and procedures provided by 29 U.S.C. §211(b), 216(b)-(d) and 217. Under 29 U.S.C. §216(c) the Secretary of Labor is authorized to sue on behalf of employees where there is a violation of the Act. Under 29 U.S.C. §216(b) the right of an employee to bring a civil action, in certain circumstances is terminated, when the Secretary commences an action. Thus, when the Secretary of Labor commences an investigation upon the basis of a complaint filed by an employee that he has been discriminated against, the employer does not necessarily have notice that the aggrieved employee intends to sue. In *Powell* v. *Southwestern Bell Telephone Company, supra*, the court stated:

> ". . . It is logical that the 180 day notice was intended to insure that potential defendants would become aware of their status and the possibility of litigation reasonably soon after the alleged discrimination since the notice goes from the Secretary of Labor on to the employer involved."

The Secretary has the power to make investigations under the ADEA, 29 U.S.C. §626(a). In the case at hand Plaintiff filed her complaint with the local wage and hour division. It in turn promised to commence an investigation and did in fact do so. The investigatory powers of the ADEA are in accordance with the powers and procedures provided by 29 U.S.C. §§209 and 211. It does not appear that under the provisions of these statutes the commencement of an investigation by the Department of Labor would effectively notify an employer that an employee intended to bring a civil action under the ADEA. Thus to hold that the mere filing of a complaint with the Department satisfies the notice requirement of 29 U.S.C. §626(d) thwarts one of the basic purposes of that section that a potential defendant become aware of its status and the possibility of litigation reasonably soon after the alleged discrimination. In fact,

as is evidenced by the facts of this case, there is no guarantee that the Labor Department investigation commenced pursuant to a discrimination complaint would even begin within a reasonably short time after the filing of the complaint. The employer would therefore not even have reason to suspect that there was some complaint against it until well after the alleged act of discrimination. This is clearly contrary to the intent of Congress.

It is apparent from the history of the ADEA that Congress was concerned with notice to an employer within a reasonable time after an alleged act of discrimination. In *Powell* v. *Southwestern Bell Telephone Company, supra,* the court noted:

> "Perhaps the most interesting feature of the origin of the 180 day notice limitation is that it appeared in the original bill as introduced in the Senate, was deleted from the House passed bill, and was restored by the amendment in the Senate when the House bill was returned for consideration by the upper chamber. The House concurred in the amendment. Its restoration, together with that of several other portions of the original Senate bill, was 'intended to answer some of the disquiet in American business . . . keeping also in mind the practical problems of administration . . .' 113 Cong.Rec. 35056 (Remarks of Senator Javits)."

It is obvious from this history that Congress attached significant importance to the 180 day notice requirement. It cannot be said that the mere filing of a complaint of discrimination with the Department of Labor fulfills the same function as the required notice of an intent to sue.

The final clause of 29 U.S.C.§626(d) reads as follows:

> "Upon receiving notice of an intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion."

The filing of notice of intent to sue performs two functions. The prospective defendant is promptly notified of the possibility of litigation. And the Secretary is induced to promptly begin informal methods of conciliation, knowing that a civil action will proceed if he does not obtain results. It cannot be said that these functions are performed by the mere filing of a complaint of age discrimination with a local office of the Department of Labor. It does not appear that in the enforcement provisions of the ADEA applicable to the Secretary that there is any requirement of promptly notifying an employer that a complaint has been filed against it. Nor does it appear that there is any requirement that the Secretary promptly act on a complaint. Therefore, the mere registration of a complaint of age discrimination with the local wage and hour division of the Department of Labor cannot be held by this Court to satisfy the notice requirement of 29 U.S.C. §626(d).

Plaintiff's final argument is that the 180 day notice period was tolled when she filed her complaint with the Department and it failed to notify her of her right to sue until after the 180 day notice period had expired. Defendant argues that Plaintiff's mere ignorance of her legal rights does not toll the running of the notice period. It is axiomatic that a person's ignorance of his legal rights will not toll the running of a statute of limitations. 54 CJS, Limitations of Actions, §205. Although a traditional statute of limitations is not involved herein, the same principle should apply. All persons are charged with knowledge of the provisions of statutes. 58 AmJur 2d, Notice, §21. Therefore, Plaintiff must be charged with notice of the provisions of 29 U.S.C. §626(d). Also, as has been previously found herein, Defendant maintained, throughout the period of

Plaintiff's employment, posted notices regarding the ADEA. These notices were conspicuously posted as is required by 29 U.S.C. §627. Although Plaintiff testified that she never saw the notices, her testimony is unbelievable. It must be concluded that a reasonably aware person in the same or similar circumstances would have seen the notices. Thus, Plaintiff had not only presumptive notice of the content of the ADEA but she also must be charged with constructive knowledge from the posted notices which would lead a reasonable person to know or to inquire into his legal rights under the ADEA.

Defendant also argues, convincingly, that the mere filing of a complaint with the Department of Labor by Plaintiff did not toll the notice period since such action is permissive and not mandatory. The use of a permissive administrative remedy does not toll running of a statute of limitations. *Steel Improvement & Forge Company* v. *United States*, 355 F. 2d 627 (Ct. Cl. 1966); *O'Callahan* v. *United States*, 451 F. 2d 1390 (Ct. Cl. 1971). Recourse to the Department of Labor is not mandatory under the ADEA except to give the required notice of intent to sue. An aggrieved employee does not have to file a complaint with the Department. An employee who wants to file his own civil action only has to notify the Department that he intends to bring such an action. There is a mandatory sixty day waiting period in which the Secretary is supposed to mediate, but this alone does not appear to make the administrative remedy mandatory. Further, the aggrieved party is not bound by the result of any settlement achieved by the Secretary in such mediation. If not satisfied the employee may sue if the required notice of intent to sue is accomplished.

It is a well settled general rule that in a given situation a statute of limitations will be tolled if the Congressional

purpose which motivated the involved legislation will thereby be effectuated. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356, 88 L. Ed. 96, 64 S Ct 128 (1943); *Burnett* v. *New York Cent. R. Co.*, 380 U.S. 424, 13 L Ed 2d 941, 85 S Ct 1050 (1965); *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 38 L Ed 2d 713, 94 S Ct 756 (1974). In *Burnett* the Court stated:

> ". . . the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances.
>
> In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act."

The Congressional purposes underlying the limitations period provided by 29 U.S.C. §626(d) have been previously considered. That policy as discussed in *Powell* v. *Southwestern Bell Telephone Company*, *supra*, was to make potential defendants aware of their status and the possibility of litigation reasonably soon after the alleged discrimination. This would promote the good faith negotiation of employers during the 60 day conciliation period provided by 29 U.S.C. §626(d). It also provides the opportunity for preservation of evidence and records for use at a trial necessitated by a failure of negotiation. It has been seen from the history of the ADEA that Congress considered the notice provisions to be important. The policies underlying the ADEA are set out in the first section of the Act, 29 U.S.C. §621. That section reads in part, as follows:

> "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."

The remedial scheme of the Act is basically two fold. An individual employee may enforce the rights created by the Act through an individual action or the Secretary may bring an action on behalf of employees. The Act encourages settlement of differences through the use of state remedies or conciliation through the offices of the Secretary.

In considering the factors delineated in *Burnett*, it is the conclusion of this Court that the purposes of the Act will not be best effectuated through tolling the limitations period herein. Plaintiff relies heavily on *Burnett*. In that case the plaintiff commenced an action under the Federal Employer's Liability Act (FELA) in a state court of competent jurisdiction. The action was dismissed due to venue provisions of the Ohio law. Plaintiff promptly refiled in a Federal District Court of competent jurisdiction. However, between the time of commencing the state action and the Federal action, the statute of limitations provided by the Act had expired. The District Court dismissed the action on the grounds that the statute of limitations had run. The Circuit Court of Appeals affirmed. The Supreme Court reversed.

The Supreme Court held that statutes of limitations are designed to promote fairness to defendants. Such statutes promote justice by preventing surprises through the assertion of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The Court noted that in the case before it the petitioner did not sleep on his rights but filed a timely action in a court of competent jurisdiction. Service of process was had on the defendant notifying it that the petitioner was asserting his rights by suit. Venue was improper under Ohio law but the defendant ,could have waived venue. The court held that the defendant could not rely on the policy of repose since it was aware that the plaintiff

was asserting its rights by suit. Thus, the Court held that the statute of limitations was tolled by the filing of the state court action.

Congress has written into the ADEA an 180 day notice requirement designed to give potential defendants prompt awareness of their status. The traditional policy reason behind a statute of limitations mentioned in Burnett, the promotion of justice by preventing surprise through the assertion of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared, may not have full effect in such a short period of time. Congress nevertheless deemed quick notice to potential defendants to be essential to its new statutory scheme to alleviate the problems of age discrimination in employment. If in creating a new right Congress deems speedy notice essential, as it obviously did in the case of the ADEA, the courts ought not to void the notice requirement for any less compelling reason than would justify the tolling of a statute of limitations. The fact that the plaintiff commenced action in a court of competent jurisdiction and served defendant with timely notice was central to the *Burnett* decision. There was no such comparable action herein by which Defendant was notified of an action against it. The rationale of *Burnett* is therefore inapplicable to this case.

Plaintiff suggests that the policy of the ADEA is humanitarian and remedial, hence timely notice should be waived in this case. It is also the policy of the Act to give potential employers prompt notice of their status as potential defendants. In this context where Plaintiff did not take any action which would justify the tolling of a statute of limitations in a parallel situation, the above policies of the Act are evently balanced and one does not outweigh the other. In such situation the intent of Congress should be fully applied. Plaintiff was not prevented from

asserting her rights by the failure of an employee of the Department of Labor to inform her of them. There is no such duty imposed by the ADEA, nor is one mentioned in the relevant CFR. Plaintiff is assumed to know the law and was possessed of more than enough information to put a reasonable person on inquiry. In this case there are no facts which justify the tolling of the 180 day limitations period. This is not to say that Plaintiff's rights are completely lost. There appears to be yet a possibility that the Department of Labor will undertake and obtain successful action on her part. Her dependence on these Departmental efforts appears to be just in this case as she elected to put her case in its hands and rely on it and not inquire into and pursue her own rights.

Plaintiff contends that she should be allowed to maintain this action as a class action under the "private attorney general" doctrine even if she is found not to have standing to sue on her own behalf. It is her position that she can maintain this action on behalf of similarly situated employees of Defendant even if she is precluded from recovery. Plaintiff relies on *Jenkins* v. *United Gas Corporation*, 400 F. 2d 28 (Fifth Cir. 1968); *Bowe* v. *Colgate-Palmolive Company*, 416 F.2d 711 (Seventh Cir. 1969); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F. 2d 421 (Eighth Cir. 1970) and *Hutchings* v. *United States Industries, Inc.*, 428 F. 2d 303 (Fifth Cir. 1970) in support of this proposition. Each of these cases appears to be distinguishable from the case at hand in that the involved plaintiffs had, at least initially, standing to sue. Herein Plaintiff does not even have initial standing to sue.

Moreover, in *O'Shea* v. *Littleton*, 414 U.S. 488, 38 L. Ed. 2d 674, 94 S Ct 669 (1974) the Court stated:

> ". . . if none of the named Plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class . . ."

Article 3 §2 of the Constitution requires that the judicial power of the United States may not be exercised unless there is an actual case or controversy before it. In order for there to be a case or controversy a plaintiff must have a personal stake in the outcome of a controversy. *Baker* v. *Carr*, 369 U.S. 186, 7 L. Ed. 2d 663, 82 S Ct 691 (1962); *O'Shea* v. *Littleson, supra*. It has been previously determined that Plaintiff herein has no standing to sue. She could not gain any recovery through the prosecution of a class action against Defendant. She has failed to satisfy a jurisdictional prerequisite to recovery on her own behalf. Therefore, she does not have a personal stake in the outcome of a class action based on alleged policies of age discrimination perpetrated by Defendant. Thus, Plaintiff does not have a case or controversy with Defendant and cannot bring a class action on behalf of others.

Accordingly, Defendant's Motion to Dismiss should be sustained and Plaintiff's action dismissed for lack of subject matter jurisdiction in this Court.

It is so ordered this 6th day of February, 1975.

/s/ Fred Daugherty
United States District Judge

EXHIBIT B

[Filed July 22 — 1976 Howard K. Phillips Clerk,
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT]

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1277
(74-C-221)

ANNE M. DARTT,
Plaintiff-Appellant,

v.

SHELL OIL COMPANY,
Defendant-Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Jefferson G. Greer of Greer and Greer on the brief for Appellant.

Mary T. Matthies of Kothe, Nichols & Wolfe, for Appellee.

Jacob I. Karro (William J. Kilberg, Solicitor of Labor; Carin Ann Clauss, Associate Solicitor; Sylvia S. Ellison, Paul D. Brenner; and Ronald M. Gaswirth, Regional Solicitor, of counsel, on the brief) for The Secretary of Labor as Amicus Curiae.

Before LEWIS, Chief Judge; BREITENSTEIN and BARRETT, Circuit Judges.

LEWIS, Chief Judge.

Mrs. Anne M. Dartt sued the defendant Shell Oil Company alleging violations of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, and the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.* The trial court dismissed Dartt's action for lack of subject matter jurisdiction because of Dartt's failure to file her notice of intent to sue within the 180-day period as required under 29 U.S.C. § 626(d)(1).[1]

Dartt had been employed at Shell's Credit Card Center in Tulsa, Oklahoma, from January 3, 1966, to July 31, 1973, at which time she was discharged. Ostensibly, Dartt was terminated by Shell because a reorganization of the credit card department had left her without any work. Dartt, who was fifty-one years of age at the time of her termination, believed that her discharge was prompted because of her age and therefore contacted an attorney. She was told by this attorney that it was unnecessary to have an attorney and that she should instead contact the Federal Wage and Hour Division. Pursuant to this advice, on August 9, 1973, Dartt met with J. Dean Speer, the Assistant Area Director of the Department of Labor's Wage and Hour Division in Tulsa. Mr. Speer interviewed Dartt, filled out the Department's complaint form, and instructed Dartt that he would investigate. When asked how long the investigation would take, Speer responded that it might take a year.

Believing that he had a good working relationship

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[1] Section 626(d) provides in part:

No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —

(1) within one hundred and eighty days after the alleged unlawful practice occurred . . . .

with Shell, Speer immediately following Dartt's visit to his office in an attempt to conciliate Dartt's complaint. Speer met several times with Shell's manager of employee relations, but concluded that his conciliation efforts with Shell were unsuccessful and moved into what he termed "an investigative posture." At this time Shell agreed to make internal studies and to prepare statistical information on its hiring and promotion practices as requested by Speer in his investigation of Dartt's complaint.

Finally, after not having received the requested information from Shell, Speer notified Dartt by letter dated March 5, 1974, that there would be some delay in completing the investigation. In this letter Speer discussed her private right to sue, enclosed a pamphlet detailing the provisions of the ADEA, and directed Dartt's attention to the time limitations for filing one's own lawsuit. Dartt testified that the letter and pamphlet constituted her first actual notice of her right to bring a private action and the 180-day notice requirement. She immediately retained private counsel who on March 14, 1974, mailed a letter to the Tulsa office of the Department of Labor giving notice of Dartt's intention to file a private lawsuit against Shell for violation of the ADEA.

After receiving this notice, Speer attempted to "reconciliate" Dartt's complaint, again without success. Speer notified Dartt's attorney on May 16, 1974, that the Department's efforts had proved unsuccessful and that she was free to take whatever action she wished. The present lawsuit was filed as a class action on May 21, 1974.

Dartt advances essentially two arguments on appeal: (1) While admitting that filing a notice of intent to sue is a prerequisite of a private civil action under the ADEA, Dartt contends that the 180-day period for doing so is not jurisdictional in the sense that it can never be extended and

asserts that this is a proper case for such extension; and (2) Even if the 180-day period is not subject to equitable modifications, Dartt's initial complaint to the Wage and Hour Division was adequate to satisfy the requirement of filing a notice of intent to sue. Dartt's latter argument is supported by the Department of Labor in its *amicus curiae* brief.

At the start we reject Dartt's second argument. Section 626(d) specifically requires a "notice of an intent to file" a private civil action. To hold that a complaint to the Labor Department of an alleged discriminatory employment practice complies with this requirement, even though the complaint never mentions an intent to file a private civil action under the ADEA, would be in complete disregard of the language of the Act. Powell v. Southwestern Bell Telephone Co., 5 Cir., 494 F2 485, 489.

The remaining issue in this case is whether the filing of a notice of intent to sue within the 180-day period provided for in section 626(d)(1) is jurisdictional in the traditional sense that failure to comply is an absolute bar to bringing an action or whether the time limitation is more analogous to statutes of limitation and subject to equitable modifications. Admittedly, ample authority supports the trial court's conclusion that compliance with section 626(d)(1) is a "jurisdictional prerequisite" to any private action under the ADEA.[2] However, after examining

[2]Ott v. Midland-Ross Corp., 6 Cir., 523 F, 1367; Hiscott v. General Elec. Co., 6 Cir., 521 F, 632; Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 5 Cir., 515 F, 1195; Powell v. Southwestern Bell Tel. Co., 5 Cir., 494 F, 485; Raynor v. Great Atl. & Pac. Tea Co., E.D. Va., 400 F. Supp. 357; Vaughn v. Chrysler Corp., E.D. Mich., 382 F. Supp. 143; Oshiro v. Pan Am. World Airways, Inc., D. Hawaii, 378 F. Supp. 80; Cochran v. Ortho Pharmaceutical Co., E.D. La., 376 F. Supp. 302; Burgett v. Cudahy Co., D. Kan., 361 F. Supp. 617; Gebhard v. GAF Corp., D. D.C., 59 F.R.D. 504.

the cases and the legislative history, we remain unconvinced that Congress intended the failure to file notice within the 180-day notice period to be an absolute bar to bringing an ADEA private action.

Because of the similarities between the ADEA and Title VII of the Civil Rights Act of 1964, courts sometimes refer to interpretations of provisions in Title VII for assistance in defining analogous sections of the ADEA. Moses v. Falstaff Brewing Corp., 8 Cir., 525 F_2 92, 94; Curry v. Continental Airlines, 9 Cir., 513 F_2 691, 693; Goger v. H.K. Porter Co., 3 Cir., 492 F_2 13, 15. Title VII requires the complainant to file a charge of alleged unlawful employment practices with the Equal Employment Opportunities Commission (EEOC) within 180 days of the alleged discrimination. 42 U.S.C. §2000e-5(e). Faced with the issue of whether this Title VII time period was jurisdictional or more like a statute of limitations, the Fifth Circuit held:

> The *ratio decidendi*, however, of the leading cases dealing with timing requirements in general under the Act compels the conclusion that the ninety day requirement [amended in 1972 to 180 days] is not "jurisdictional" in the sense that compliance with it *vel non* determines the jurisdiction of the district court, without respect to any of the other circumstances in a particular case. We accept the view that the requirement should be analogized to statutes of limitations. Equitable modifications, such as tolling and estoppel, that are applied to them should also be applied here.

Reeb v. Economic Opportunity Atlanta, Inc., 5 Cir., 516 F_2 924, 928. *Reeb* is not alone in allowing equitable considerations to toll the time limitations established by Title VII. *See, e.g.*, Culpepper v. Reynolds Metals Co., 5 Cir., 421 F_2 888, 891, Antonopulos v. Aerojet-General Corp., E.D. Cal., 295 F. Supp. 1390, 1395. The *Reeb* court's

holding that the notice period was not jurisdictional in the strict sense was based on the arguments that: (1) Since the complainants under the Act would most likely be laymen, they should not be held to "the technical rules of common law pleading" in filing their charges; (2) Title VII was remedial legislation and therefore entitled to a liberal construction; and (3) Many of the cases calling the time limitation "jurisdictional" were suffering from a "conceptual confusion" since having labeled the requirement jurisdictional they proceeded to toll the time limitation for equitable reasons.

This court has also determined that under certain conditions the 180-day period for filing charges with the EEOC may be tolled. Sanchez v. Trans World Airlines, Inc., 10 Cir., 499 F_2 1107, 1108. *See also* Archuleta v. Duffy's Inc., 10 Cir., 471 F_2 33 & n.1 (where this court referred to the time limitation for filing a civil action after receiving a right-to-sue notice from the EEOC as a "statute of limitations").

Many of the arguments advanced for tolling Title VII time limitations are applicable to the time limitations in the ADEA. In a recent case discussing section 626(d)(1) time limitations, a court observed that the confusing use of the term "jurisdictional" in some Title VII cases was also occurring in ADEA cases: "Many courts have labeled the filing requirements 'jurisdictional' but have treated them as analogous to statutes of limitations and subject to equitable modifications." Skoglund v. Singer Co., D. N.H., 403 F. Supp. 797, 804. For example, a recent Fifth Circuit case held that section 626(d)(1) prerequisites were jurisdictional, but proceeded to outline several instances where the 180-day notice period might be tolled. Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 5 Cir., 515 F_2 1195, 1198. In dictum, the court suggested that the period

might be tolled until an aggrieved employee obtained legal counsel or acquired an actual knowledge of his rights under the ADEA. The court concluded, however, that it need not determine whether tolling was allowable because the plaintiff in that case had failed "to file notice within 180 days of securing counsel or within 180 days of actual knowledge." *Id.* Thus, it appears that even though the Fifth Circuit was the first court of appeals to label section 626(d)(1) requirements as jurisdictional, *Powell, supra,* it has left the door open for possible equitable modification of the 180-day notice period. This conclusion is further supported by the Fifth Circuit's determination that the analogous time limitation in Title VII was not jurisdictional, but subject to modifications. *Reeb, supra.*

Other cases dealing with the ADEA time limitations have also confusingly used the label "jurisdictional" while allowing a liberal interpretation of ADEA requirements. *See, Moses, supra;* Burgett v. Cudahy Co., D. Kan., 361 F. Supp. 617. These conceptual difficulties appear to be caused by an overly broad usage of the term "jurisdictional."

Other arguments support a determination that section 626(d)(1)'s time limitation should be treated as analogous to a statute of limitations. The ADEA is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment. *Moses, supra* at 93; *Skoglung, supra* at 801. Additionally, strict compliance with section 626(d)(1)'s time limitation should not be required of laymen attempting to enforce their statutory rights. *Skoglund, supra* at 801; Woodford v. Kinney Shoe Corp., N.D. Ga., 369 F. Supp. 911, 915. *See also* Love v. Pullman Co., 404 U.S. 522, 527; *Reeb, supra* at 928.

We do not contend that a filing of a notice of intent

to sue is not a condition precedent to an action under the ADEA. However, the similarities between Title VII and the ADEA, the liberal reading of analogous time limitations in Title VII, the overly broad usage of the term "jurisdictional" by courts interpreting section 626(d) of the ADEA, the remedial nature of the legislation, and the lack of legal training and guidance for many of the ADEA complainants lead us to conclude that while section 626(d)(1)'s notice of intent-to-sue requirement cannot be waived, the 180-day time limitation should be interpreted as being subject to possible tolling and estoppel.[3] *See Moses, supra; Scoglund, supra; Woodford, supra;* and Bishop v. Jelleff Associates, D. D.C., 398 F. Supp. 579.

Left for consideration is the determination of whether the circumstances surrounding Dartt's complaint contain equitable factors warranting a tolling of the 180-day notice period. Placing emphasis upon Dartt's presumptive knowledge of the law and constructive notice from Shell's posted notices, discussed *infra,* note 5, the trial court held that Dartt was entitled to no equitable relief by way of tolling. We do not agree. Initially, Mrs. Dartt consulted an attorney who told her to take her complaint to the Labor Depart-

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[3]This conclusion is not inapposite to our recent holding in Law v. United Air Lines, Inc., 10 Cir., 519 F. 170. In *Law,* we found that filing of the notice was a "precedent" to a private action. In support of said proposition, we stated that we were "in accord with *Powell*." *Id.* at 171. Tolling was not an issue in *Law* since the notice was filed more than 5 years after the alleged discriminatory act. Also, as we noted in our discussion of *Edwards, supra,* the Fifth Circuit did not intend to "close the door" on possible equitable modifications of section 626(d)(1)'s time limitations by its *Powell* decision. The Fifth Circuit itself noted that it was partially rejecting the plaintiff's tolling theory because the plaintiff "was expressly alerted to the time limitations for possible action, both private and agency assisted." *Powell, supra* at 490. The court in Powell simply was not faced with a situation where the equities dictated a tolling. Neither were we in *Law.*

ment's local Wage and Hour Division office.[4] Dartt promptly did so and was told by Mr. Speer, Assistant Area Director, that it might take up to a year before the investigation was concluded. Anxious to check on the progress of her case, Mrs. Dartt testified that after her initial interview with Mr. Speer, she telephoned Speer at least once a month. It was not until after the 180-day period had run that Dartt was informed that in order to bring a private lawsuit against Shell she would have to file notice of intent to sue within 180 days of the alleged discriminatory act. Immediately Dartt retained another attorney who promptly filed the requisite notice of intent to sue, even though it was 36 days beyond the statutory time period.

An important factor in determining whether to exercise this court's equitable powers to toll section 626(d)(1)'s time limitation is whether to do so would be in keeping with the congressional purpose of the ADEA. The two basic purposes behind the 180-day notice requirement are (1) To provide the Labor Department with an opportunity

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[4]Dartt testified that when she telephoned an attorney to discuss Shell's possible infringement of the ADEA, the attorney responded: "You don't need an attorney. You need to go to the Federal Wage and Hour Department." Had Dartt's contact been more than a preliminary approach as to possible consultation, we might possibly be led to the conclusion reached in *Edwards, supra,* where the court noted that it would be:

> [A] singularly inappropriate situation for such a remedy, in view of the fact that Edwards consulted an attorney long before the 180 day period ran. In such a circumstance, he had the "means of knowledge" of his ADEA rights, for the very purpose of consulting an attorney is to ascertain what legal redress arises out of a factual situation encompassing a supposed wrong. While it may be inequitable to allow an employer to benefit from his own wrong, it would be at least equally unfair to then hold that the employer is estopped from raising the 180 day bar where the injured employee consulted an attorney who either slept on his client's rights or did not believe he had any under the statute.

Id. at 1200 n.8.

to achieve a conciliation of the complaint while the complaint is still fresh, and (2) to give early notice to the employer of a possible lawsuit, the latter promoting both the preservation of evidence and good faith negotiating on the part of the employer during the conciliation period. *Moses, supra* at 94; *Powell, supra* at 488. From the record it appears that both of these purposes were fulfilled in spite of Dartt's tardy filing of the notice of intent to sue. Shell received early notification of Dartt's allegations; a Shell representative was contacted by telephone the same day that Dartt registered her allegations with the Labor Department. Also, the Labor Department attempted to conciliate Dartt's complaint following her initial complaint and well before receiving her notice of intent to sue.

There are other facts which tend to support an equitable extension of the 180-day notice period. For example, even though not required to do so by statute, it was the customary practice of Mr. Speer to advise every complainant of the 180-day notice of intent-to-sue requirement, which he did not do in this instance. Furthermore, Speer testified that he was awaiting certain statistical information which Shell had agreed to provide him before sending Mrs. Dartt the letter of March 5 which notified her of her right to bring a private suit under ADEA and the requirement of filing a notice of intent to sue within 180 days of the discriminatory act. In an indirect manner, therefore, Shell's failure to provide the agreed upon information to the Wage and Hour Division contributed to Speer's failure to notify Dartt of her right to sue prior to the running of the 180-day period. Finally, even though Congress inserted a requirement that employers must post such information pertaining to the ADEA "as the Secretary [of Labor] deems appropriate to effectuate the purposes of [the Act]," 29 U.S.C. §627, such notice posted by Shell, even though

provided by the Wage and Hour Division, was completely inadequate to inform Dartt as to the 180-day notice requirement.[5]

We cannot fault Dartt in her efforts to present her cause. She twice promptly sought private legal advice and twice promptly followed that advice. Short of anticipating an administrative dereliction by the Wage and Hour Division, despite her prodding of that agency, it was not to be expected that lapse of time would void her cause. This is not a case of a plaintiff sleeping on her rights nor a defendant in any way being prejudiced thereby either presumptively or in fact. In light of these circumstances and the *de facto* fulfillment of the main purposes of the Act, we hold that the time limitation was tolled until the filing of Dartt's notice of intent to sue.

Reversed and remanded for further proceedings consistent with this decision.

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[5]The printed notice which was furnished to Shell by the Department of Labor noted that the ADEA was applicable to persons age 40 to 65, listed the employers who were subject to the Act, and stated:

> If you feel you have been discriminated against in matters of hiring, discharge, compensation, or other phases of employment because of your age, contact the:
>
> U.S. Department of Labor
> Wage and Hour Division

Without discussing whether the notice adequately complied with Congress' language that the notice set forth "information as the Secretary deems appropriate to effectuate the purposes of" the ADEA, 29 U.S.C. §627, we could not in good conscience hold Dartt to strict compliance of the 180-day notice period by constructive notice of this posting.

EXHIBIT C

JULY TERM — August 19, 1976

Before The Honorable David T. Lewis, Chief Judge,
The Honorable Jean S. Breitenstein, Senior Judge,
The Honorable Delmas C. Hill,
The Honorable Oliver Seth,
The Honorable William J. Holloway, Jr.,
The Honorable Robert H. McWilliams,
The Honorable James E. Barrett and
The Honorable William E. Doyle, Circuit Judges

No. 75-1277

ANNE M. DARTT,
Plaintiff-Appellant,

vs.

SHELL OIL COMPANY,
Defendant-Appellee.

DEPARTMENT OF LABOR,
Amicus Curiae.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Lewis, Senior Circuit Judge Breitenstein and Circuit Judge Barrett to whom the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of

Appellate Procedure, the suggestion for rehearing en banc is denied.

/S/ HOWARD K. PHILLIPS
Clerk

/S/ LINDA A. HALL
Deputy Clerk

EXHIBIT D

§626. Recordkeeping, investigation, and enforcement

Attendance of witnesses; investigations, inspections, records, and homework regulations

(a) The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall

attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

Same; notice to Secretary: timeliness; conciliation, conference, and persuasion

(d) No civil action may be commenced by any individual under this section until the individual has given the Secretary not less than sixty days' notice of an intent to file such action. Such notice shall be filed —

(1) within one hundred and eighty days after the alleged unlawful practice occurred, or

(2) in a case to which section 633(b) of this title applies, within three hundred days after the alleged unlawful practice occurred or within thirty days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Statute of limitations; reliance in future on administrative rulings, etc.

(e) Sections 255 and 259 of this title shall apply to actions under this chapter.

SET FORTH BELOW IS THE TEXT OF 29 U.S.C. §216, WHICH IS INCORPORATED BY REFERENCE IN 29 U.S.C. §626(b)

§216. Penalties; civil and criminal liability; injunction proceedings terminating right of action; waiver of claims; actions by Secretary of Labor; limitation of actions; savings provision

(a) Any person who wilfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded

to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

(c) The Secretary is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 206 or 207 of this title, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. The Secretary may bring an action in any court of competent jurisdiction to recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages. The right provided by subsection (b) of this section to bring an action by or on behalf of any employee and of any employee to become a party plaintiff to any such action shall terminate upon the filing of a complaint by the Secretary in an action under this subsection in which a recovery is sought of unpaid minimum wages or unpaid overtime compensation under sections 206 and 207 of this title or liquidated or other damages provided by this subsection owing to such

employee by an employer liable under the provisions of subsection (b) of this section, unless such action is dismissed without prejudice on motion of the Secretary. Any sums thus recovered by the Secretary of Labor on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary of Labor under this subsection for the purposes of the statutes of limitations provided in section 255(a) of this title, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.

(d) In any action or proceedings commenced prior to, on, or after Aug. 8, 1956, no employer shall be subject to any liability or punishment under this Act or the Portal-to-Portal Act of 1947 on account of his failure to comply with any provision or provisions of such Acts (1) with respect to work heretofore or hereafter performed in a workplace to which the exemption in section 213(f) of this title is applicable, (2) with respect to work performed in Guam, the Canal Zone or Wake Island before the effective date of this amendment of subsection (d), or (3) with respect to work performed in a possession named in section 206(a) (3) of this title at any time prior to the establishment by the Secretary, as provided therein, of a minimum wage rate applicable to such work.

(e) Any person who violates the provisions of section 212 of this title, relating to child labor, or any regulation issued under that section, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. In determining the amount of such penalty, the appropriateness of such penalty to the size of the business of the person charged and the gravity of the violation shall be considered. The amount of such penalty, when finally determined, may be —

(1) deducted from any sums owing by the United States to the person charged;

(2) recovered in a civil action brought by the Secretary in any court of competent jurisdiction, in which litigation the Secretary shall be represented by the Solicitor of Labor; or

(3) ordered by the court, in an action brought for a violation of section 215(a) (4) of this title, to be paid to the Secretary.

Any administrative determination by the Secretary of the amount of such penalty shall be final, unless within fifteen days after receipt of notice thereof by certified mail the person charged with the violation takes exception to the determination that the violations for which the penalty is imposed occurred, in which event final determination of the penalty shall be made in an administrative proceeding after opportunity for hearing in accordance with section 554 of Title 5 and regulations to be promulgated by the Secretary. Sums collected as penalties pursuant to this section shall be applied toward reimbursement of the costs of determining the violations and assessing and collecting such penalities, in accordance with the provisions of section 9a of this title.

SET FORTH BELOW IS THE TEXT OF 29 U.S.C. §255, WHICH IS INCORPORATED BY REFERENCE IN 29 U.S.C. §626(e)

§255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act —

(a) if the cause of action accrues on or after May 14, 1947 — may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

(b) if the cause of action accrued prior to May 14, 1947 — may be commenced within whichever of the following periods is the shorter: (1) two years after the cause of action accrued, or (2) the period prescribed by the applicable State statute of limitations; and, except as provided in paragraph (c) of this section, every such action shall be forever barred unless commenced within the shorter of such two periods;

(c) if the cause of action accrued prior to May 14, 1947, the action shall not be barred by paragraph (b) of this section if it is commenced within one hundred and twenty days after May 14, 1947 unless at the time commenced it is barred by an applicable State statute of limitations;

(d) with respect to any cause of action brought under section 216(b) of this title against a State or a political subdividion of a State in a district court of the United States on or before April 18, 1973, the running of the statutory periods of limitation shall be deemed suspended during the period beginning with the commencement of any such action and ending one hundred and eighty days after the effective date of the Fair Labor Standards Amendments of 1974, except that such suspension shall not be applicable if in such action judgment has been entered for the defendant on the grounds other than State immunity from Federal jurisdiction.

SET FORTH BELOW IS THE TEXT OF 29 U.S.C. §259, WHICH IS INCORPORATED BY REFERENCE IN 29 U.S.C. §626(e)

§259. Reliance in future on administrative rulings, etc.

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or

enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be —

(1) in the case of the Fair Labor Standards Act of 1938, as amended — the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act — the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act — the Secretary of Labor.

EXHIBIT E

STATE OF OKLAHOMA }
COUNTY OF TULSA } SS.

AFFIDAVIT

I, KENNETH JACOBS, of lawful age, being first duly sworn upon oath, depose and say:

That I am the Manager of Employee Relations for the Shell Oil Company Credit Card Center, located at 6502 South Yale, Tulsa, Oklahoma.

During my employment in that capacity, I had occasion to participate in several discussions with J. Dean Speer, Assistant Area Director of the local Wage and Hour Division office, regarding the discharge of Anne M. Dartt.

My first meeting with Mr. Speer regarding the Dartt case was on August 24, 1973. According to Mr. Speer, the purpose of that meeting was to advise Shell Oil Company of the charge by Ms. Dartt and to attempt to discover what the facts were in the case. Mr. Speer told us briefly what Ms. Dartt's allegations were, and I, in turn, advised Mr. Speer that Shell's reason for Ms. Dartt's termination was her poor work performance.

Mr. Speer then asked for some data on performance appraisals for Ms. Dartt and other persons in her job classification, which I subsequently mailed to him on September 4, 1973. During our meeting, Mr. Speer never stated that he was "conciliating" the Dartt charge. Instead, he gave me every indication he was pursuing an ordinary investigation.

Our next meeting was on October 31, 1973. At that time, Mr Speer informed me that he had conducted interviews with several employees in his investigation of the Dartt charge, and that he felt that he had, in essence, a

prima facie case against Shell. He then proceeded to outline the various aspects which he believed would create a *prima facie* case in the Dartt charge. At that time, he asked whether we wanted an opportunity to present evidence in support of our position that no discrimination had occurred, or whether we were interested in settlement. I informed him that I would have to get back to him later as to the position of Shell on either exploring settlement or proceeding with the investigation.

On November 27, 1973, I wrote to Mr. Speer and advised him that we would proceed to compile certain data which he had indicated he would need if we decided not to explore settlement. The studies which Mr. Speer had requested were quite voluminous, and Mr. Speer was aware that it would take several months to complete the compilation of the requested data.

On February 25, 1974, I talked with Mr. Speer and advised him that we are making progress on the compilations and would complete them as soon as possible. Then, on March 18, 1974, Shell received a copy of the Notice of Intent to Sue filed by Ms. Dartt. Shortly thereafter, I met with Mr. Speer, who advised me that he no longer needed the compilations, inasmuch as Ms. Dartt was pursuing a private cause of action. At this same meeting, Mr. Speer advised me that he was no longer acting as an investigator with respect to the charge, but was there solely as a "mediator." He stated that it made no difference to him as to who was right in the dispute, and that anything the parties could agree on was fine with him.

The attitude of Mr. Speer was wholly different in this meeting than in our meeting of October 31, 1973. In the October meeting, Speer had stated that any settlement of the case would need to be acceptable to the Department of Labor and to Ms. Dartt. In the meeting mentioned

above, he appeared to be disinterested in how the case was settled. Furthermore, in the October, 1973 meeting, Mr. Speer merely offered Shell the opportunity to explore settlement of the charge, whereas, in the last meeting, Speer appeared to be actively interested in bringing the parties together without any control by Speer over the terms of the settlement.

I requested that Mr. Speer determine what Ms. Dartt was interested in as a settlement of the case. Mr. Speer telephoned me the next day, April 5, 1974, to inform me of Ms. Dartt's initial demands. I told Mr. Speer that Shell would discuss her offer, and decide whether it would make a counteroffer. Mr. Speer actively encouraged me to consider her offer, and stated he would present any counteroffer to Ms. Dartt.

We later determined that, for a variety of reasons, conciliation should not proceed, and so informed Mr. Speer. Shortly thereafter, the lawsuit by Ms. Dartt was filed.

I have read the above and foregoing statement, consisting of four (4) pages, and it is true and correct to the best of my knowledge and belief.

/s/ KENNETH JACOBS

Subscribed and sworn to before me this 28th day of August, 1975.

/s/ NOTARY PUBLIC

My commission expires:
June 17, 1978

EXHIBIT F

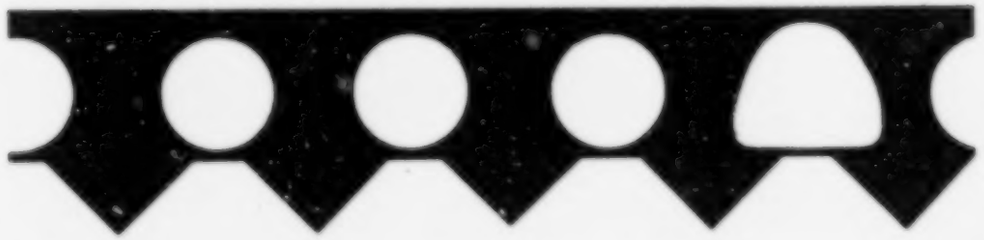
EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW

LA LEY EXIGE IGUALDAD DE OPORTUNIDAD PARA TODOS EN EL EMPLEO

Discrimination Is Prohibited

by Title VII of the Civil Rights Act of 1964 and by Executive Orders 11246 and 11375

El Título VII de La Ley de Derechos Civiles de 1964 prohibe la discriminación en el empleo.



FEDERAL LAW PROHIBITS job discrimination because of RACE, COLOR, RELIGION, SEX or NATIONAL ORIGIN.

This protects employees of private employers, la- ...ajies, employment agencies, state and local governments, and educational institutions. ANY PERSON who believes he or she has been discriminated against should contact immediately

THE U S EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1800 G Street, NW
Washington, D C 20506

or

any EEOC District Office listed in your local telephone directory under U S Government.

Executive Order Number 11246, issued by the President, prohibits job discrimination because of RACE, COLOR, RELIGION, SEX or NATIONAL ORIGIN, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

This protects employees of any company with a contract or a subcontract with the Federal Government. ANY PERSON who believes he or she has been discriminated against should contact

THE OFFICE OF
FEDERAL CONTRACT COMPLIANCE
U S Department of Labor
Washington, D C 20210

LA LEY FEDERAL PROHIBE discriminación en el empleo por motivos de su RAZA, COLOR, RELIGION, SEXO, u ORIGEN NACIONAL.

La ley protege empleados de compañías privadas, sindicatos de trabajadores (unions), agencias de empleo, escuelas e instituciones de educación, y para gobiernos de los estados o municipios y sus agencias. CUALQUIER PERSONA que crea que sus derechos han sido violados debe de escribir al

THE U S EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
1800 G Street, NW
Washington, D C 20506

o

cualquier oficina de distrito del EEOC. Consulte la guía local de teléfono debajo de "United States Government."

La orden ejecutiva Numero 11246, del Presidente, prohibe la discriminación en el empleo por motivos de su RAZA, COLOR, RELIGION, SEXO, u ORIGEN NACIONAL y exige que ciertas patronos tomen acción positiva para garantizar igualdad de oportunidad en todos los aspectos del empleo.

Esta orden protege a los empleados de cualquier compañía o a aquellos que trabajan para un patron que tenga un contrato o subcontrato con el gobierno Federal. CUALQUIER PERSONA que crea que un contratista o subcontratista debe escribir a

THE OFFICE OF
FEDERAL CONTRACT COMPLIANCE
U S Department of Labor
Washington, D C 20210

EXHIBIT G

REMEMBER . . .

The official Notice to Employees must be posted where employees can readily see it.
Records must be kept.
If you have any questions concerning the Federal Minimum Wage Law, contact the nearest office of the UNITED STATES DEPARTMENT OF LABOR, Wage and Hour Division

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This official NOTICE TO EMPLOYEES is being sent to employers generally. The fact that you have received a copy does not mean that it has been determined that your employees are subject to the Act's minimum wage and overtime provisions. If you have any question about how the law applies, contact the nearest Wage and Hour office.

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Washington, D.C. 20210

OFFICIAL BUSINESS
Penalty for Private Use, $300

Postage and Fees Paid
U.S. DEPARTMENT OF LABOR
LAB 701

THIRD CLASS

Address Correction Requested
Return Postage Guaranteed

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
Washington, D.C. 20210

NOTICE TO EMPLOYEES:

Beginning May 1, 1974 THE FAIR LABOR STANDARDS ACT AS AMENDED (THE FEDERAL MINIMUM WAGE LAW) REQUIRES:

A MINIMUM WAGE OF AT LEAST

$2.00 an hour

$2.10 an hour, beginning January 1, 1975
$2.30 an hour, beginning January 1, 1976

This minimum wage must be paid to non-agricultural employees who are engaged in or are producing goods for interstate commerce, or who are employed in certain large enterprises brought within the coverage of the Fair Labor Standards Act prior to 1966.

AND

OVERTIME PAY AFTER 40 HOURS A WEEK AT NOT LESS THAN ONE AND ONE-HALF THE EMPLOYEE'S REGULAR RATE OF PAY

For employees in enterprises brought within the coverage of the Fair Labor Standards Act in 1966, 1972, or 1974, THE LAW REQUIRES: Beginning May 1, 1974—

A MINIMUM WAGE OF AT LEAST

$1.90 an hour

$2.00 an hour, beginning January 1, 1975
$2.20 an hour, beginning January 1, 1976
$2.30 an hour, beginning January 1, 1977

Employees entitled to this minimum wage are employed by each establishments and enterprises as preschools, schools and colleges; hospitals and other health care institutions; laundries; small construction firms; large hotels, motels and restaurants; motion picture theaters; state and local government agencies; private households; and other small establishments.

AND

OVERTIME PAY AFTER 40 HOURS A WEEK AT NOT LESS THAN ONE AND ONE-HALF TIMES THE EMPLOYEE'S REGULAR RATE OF PAY.

There are specific exemptions from the minimum wage and overtime pay provisions of the Fair Labor Standards Act, or from its overtime provisions only, as to specified employees employed by certain establishments and in named occupations. The Act also provides for a lower minimum for agriculture, has provisions prohibiting oppressive child labor, and requires equal pay for equal work regardless of sex.

The Act prohibits discharging or discriminating against an employee because he has filed a complaint or participated in a proceeding under the Act.

MORE INFORMATION IS AVAILABLE AT WAGE-HOUR OFFICES LOCATED IN 350 COMMUNITIES THROUGHOUT THE COUNTRY. CONSULT YOUR TELEPHONE DIRECTORY UNDER U.S. GOVERNMENT, DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION OR WRITE:

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
Washington, D.C. 20210

U.S. LABOR DEPARTMENT
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

HIGHLIGHTS OF THE FAIR LABOR STANDARDS ACT AMENDMENTS OF 1974

(Effective May 1, 1974)

These Highlights discuss the Act's provisions which have been affected by the 1974 Amendments. They are for general information and are not to be considered in the same light as official statements of position contained in Interpretative Bulletins and other such releases formally adopted by the Wage and Hour Division and published in the Federal Register.

HIGHLIGHTS OF THE
Fair Labor Standards Act Amendments of 1974

The Fair Labor Standards Act provides different minimum wage and overtime standards for employment subject to the law prior to February 1, 1967 and employment brought under the law after that date.

Provisions applicable to employment covered prior to February 1, 1967

AT LEAST

$2.00 an hour, beginning May 1, 1974
$2.10 an hour, beginning January 1, 1975
$2.30 an hour, beginning January 1, 1976

OVERTIME PAY

Not less than 1½ times the employee's regular rate of pay for all hours worked beyond 40 in a workweek.

COVERAGE

The above minimum rates must be paid, except where a specific exemption is provided, to all employees engaged in or producing goods for interstate or foreign commerce, and to all other employees employed in any of the following enterprises engaged in or producing goods for commerce, including work relating to goods that have been moved in or produced for commerce:

(1) Retail or service enterprises having an annual gross volume of sales of at least $1 million* and $250,000 annual inflow of interstate goods;

(2) Local transit enterprises having an annual gross volume of sales of at least $1 million*;

(3) Construction enterprises doing a gross annual business of at least $350,000;

(4) Gasoline service stations having an annual gross volume of sales of at least $250,000*;

(5) Establishments other than the above having individually covered employees, an enterprise having an annual gross volume of at least $1 million.

* Exclusive of excise taxes at the retail level which are stated separately stated.

Provisions applicable on and after May 1, 1974 to employment of employees brought under the Act in 1967 and later.

AT LEAST

$1.90 an hour, beginning May 1, 1974
$2.00 an hour, beginning January 1, 1975
$2.20 an hour, beginning January 1, 1976
$2.30 an hour, beginning January 1, 1977

OVERTIME PAY

Not less than 1½ times the employee's regular rate of pay for all hours worked beyond 40 in a workweek.

The rates shown above have to be paid, except where a specific exemption is provided, to all employees whose employment came under the Act in 1967 and later. Such employees include those brought under the minimum wage or overtime pay provisions by amendments since 1966, either through elimination or narrowing of prior exemptions or as a result of the extension of coverage on an enterprise basis to employees in the following enterprises engaged in or producing goods for commerce, including work relating to materials that have been moved in or produced for commerce:

* (1) Laundry and dry cleaning enterprises;

* (2) Construction enterprises;

* (3) Hospitals, nursing homes, preschool, schools and institutions (both public and private) and Federal, State, Local and interstate governments and agencies;

(4) Other enterprises, if the annual gross volume of sales or business is at least $250,000* (exclusive of excise taxes at the retail level which are stated separately) and in addition,

* (5) Domestic service workers.

* No annual dollar volume test applies.
* Exclusive of any excise taxes at the retail level.

FARM LABOR COVERAGE: Employees employed in agriculture, by an employer who used more than 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year, must be paid a minimum wage of at least $1.60 an hour beginning May 1, 1974; $1.80 an hour beginning January 1, 1975; $2.00 an hour beginning January 1, 1976; $2.20 an hour beginning January 1, 1977; and $2.30 an hour beginning January 1, 1978.

EXEMPTIONS UNDER AMENDED ACT

A minimum wage and overtime pay exemption for employees of small retail or service establishments applies where the establishment is not in a covered enterprise (i.e., an enterprise with $250,000 annual volume). This exemption will be phased out by January 1, 1977, for such chain store establishments and for establishments controlled by a conglomerate. This exemption does not apply to laundries, dry cleaners, health care institutions, or schools. The overtime exemptions for employees of hotels, motels, restaurants, food service operations in retail establishments, and bowling alleys have been revised. The overtime provisions will apply to such employees after a specified number of hours and in some cases, are eventually phased out.

Motion picture theaters with $250,000 annual volume are subject to the $1.90 minimum wage but continue to have an overtime exemption.

The overtime exemption after 48 hours a week for nursing home employees has been deleted. A nursing home may now have an agreement with its employees to pay overtime after 80 hours in a work period, just as hospitals do.

There are special overtime provisions for fire and police personnel, including security personnel in correctional institutions. Domestics who reside in the household where they work are exempt from overtime. Persons performing casual baby sitting services and companions for aged or infirm persons are exempt.

Exemptions for certain agricultural operations and certain agricultural processing occupations have been revised. The overtime exemptions for seasonal industries, and for cotton ginning and processing employees, will be phased out over a two year period. Employees on farms owned or controlled by a conglomerate are subject to the minimum wage but remain exempt from overtime.

Full-time students may be employed on a part-time basis in retail and service establishments, agriculture and institutions of higher education at 85 percent of the applicable minimum wage under special certificates issued by the Wage and Hour Division.

The overtime exemption for local transit operating employees will be phased out. The minimum wage exemption for employees in small logging crews is repealed, but they remain exempt from the overtime.

The Act contains other minimum wage and full or partial overtime exemptions. For information about these exemptions and other provisions of the law, contact the nearest office of the Wage and Hour Division, Employment Standards Administration.

CHILD LABOR

Sixteen years is the minimum age for most employment covered by the Act. There are special child labor provisions for employment in agriculture. Violations of the child labor provisions are subject to fines up to $1,000 for each violation.

ENFORCEMENT

Failure to pay the statutory minimum wage and overtime compensation results in cumulative back wage liabilities. Unpaid wages may be collected under the supervision of the Secretary of Labor or recovered through court action brought by the Secretary or employee. Serious violations of the law may result in civil or criminal action. Records required by the law must be available for inspection by representatives of the Division.

EXHIBIT H

40-65
Persons 40-65 Years—Note!
The Age Discrimination in Employment Act prohibits arbitrary age discrimination in employment by
Employers of 25 or more persons
Employment Agencies serving such employers
Labor Organizations with 25 or more members
Certain Exceptions are Provided
If you feel you have been discriminated against in matters of hiring, discharge, compensation, or other phases of employment because of age, contact the:
U.S. Department of Labor
Wage and Hour Division
Local Address:

EXHIBIT 1

Persons 40-65 Years Note!

The Age Discrimination in Employment Act prohibits arbitrary age discrimination in employment by

- Private Employers of 20 or more persons
- Federal, State, and Local Governments, without regard to the number of employees in the employing unit (effective May 1, 1974)
- Employment Agencies serving such employers
- Labor Organizations with 25 or more members

Certain exceptions are provided.
If you feel you have been discriminated against because of age, contact the nearest office of the Wage and Hour Division, U.S. Department of Labor. If you wish to file your own suit, you must do so within prescribed time limits. It is important to contact the Division promptly.

Questions on Federal employment should be directed to the U.S. Civil Service Commission, Washington, D.C. 20415.

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division